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No. 1930

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

THE MINIDOKA & SOUTHWESTERN RAIL-
ROAD COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a Cor-
poration),

Appellees.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court
for the District of Idaho, Central Division.

FILED

FEB 4 - 1911

No. 1930

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Appellant,

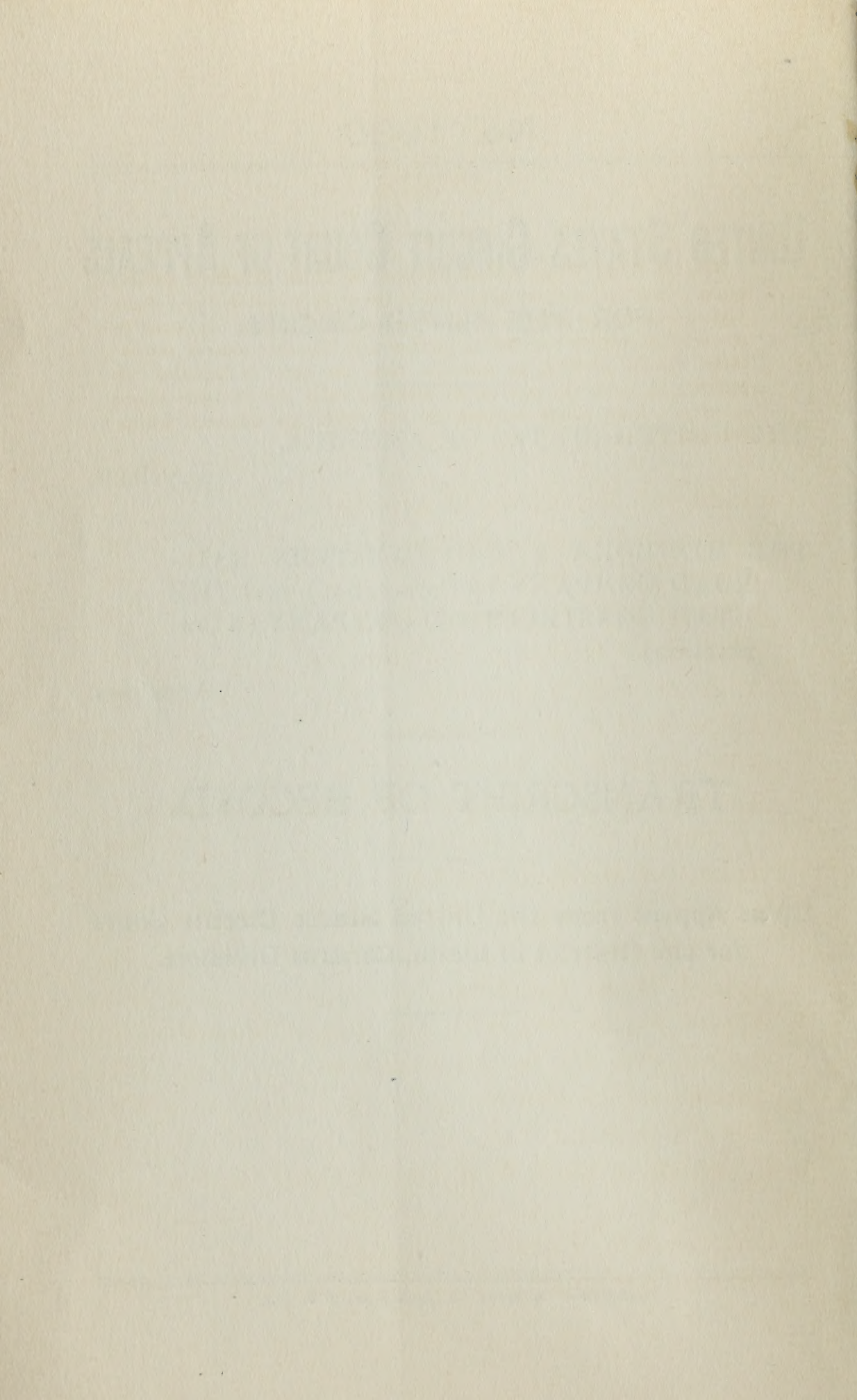
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poration),

Appellees.

TRANSCRIPT OF RECORD.

**Upon Appeal from the United States Circuit Court
for the District of Idaho, Central Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed with brackets.]

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[Names and Addresses of Attorneys.]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THE UNITED STATES OF AMERICA,
Complainant and Appellant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),

Defendants and Appellees.

C. H. LINGENFELTER, Esq.,

B. E. STOUTEMYER, Esq.,

Residence, Boise, Idaho.

Attorneys for Appellant.

P. L. WILLIAMS, Esq.,

D. WORTH CLARK, Esq.,

Residence, Pocatello, Idaho.

Attorneys for Appellees.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY, THE UTAH CONSTRUCTION
COMPANY,

Defendants.

Bill of Complaint.

The United States of America, by C. H. Lingelfelter, United States Attorney for the District of Idaho, acting in this behalf by direction of the Attorney General of the United States, brings this its bill of complaint against the Minidoka & Southwestern Railroad Company, The Utah Construction Company, _____

citizens of and residents within the State of Idaho and County of Cassia and thereupon alleges:

I. That the defendant, Minidoka & Southwestern Railroad Company is a corporation organized and existing under and by virtue of the laws of the State of Idaho. That the Utah Construction Company is a corporation organized and existing under and by virtue of the laws of the State of Utah and duly authorized to do business in the State of Idaho and doing business in the State of Idaho and County of Cassia. That the defendant, The Utah Construction Company is a contractor acting under contract with the Minidoka & Southwestern Railroad Company, and that defendants _____ and _____ are sub-contractors acting under the defendant, The Utah Construction Company.

2. That this complainant, The United States of America, operating under the provisions of the Act of Congress approved June 17, 1902, (32 Stat. 388) known as the Reclamation Act, has constructed and is now operating a certain irrigation project in the State of Idaho and counties of Lincoln and Cassia consisting of a diversion dam across Snake River

Reservoir on Snake River and numerous canals, laterals, irrigation ditches and drainage ditches also an electrical power plant and transmission lines connecting with pumping stations by means of which water is pumped for the irrigation of the lands lying above the gravity canals, all of which said canals, laterals, ditches, transmission lines and irrigation works have been constructed under the authority of the United States under the provisions of the Act of Congress of June 17, 1902, (32 Stat. 388) on rights of way located upon the withdrawn public lands of the United States or upon rights of way granted to the United States by the State of Idaho or by private parties. That the United States is the owner in fee of all of said ditches, canals, laterals, drains, transmission lines and irrigation works and is in possession thereof and entitled to the possession thereof. That the United States is the owner in fee of said rights of way and is now and for more than five years last past has been in possession thereof, open notorious and adverse, and entitled to the possession thereof.

3. Under the said canals and irrigation system of the complainant as at present constructed there is about one hundred and thirty thousand acres of irrigable land, and it is the purpose of the complainant to extend said project by means of a feasible pumping system on the North Side for the irrigation of about one hundred and twenty thousand acres in addition to the one hundred and thirty thousand acres under the present canals, making about two hundred and fifty thousand acres in all, said exten-

sion being known as the North Side Pumping System or the North Side Extension of the Minidoka Project. That all of the said lands under said Minidoka Project and the extension thereof are arid in character and require irrigation to produce agricultural crops thereon, but are very rich and productive when irrigated. That the said Government ditches, canals, and irrigation works and the proposed extensions thereof are the only means for the irrigation of said lands. That the gravity system of the Minidoka Project is practically completed, of sufficient capacity for the irrigation of the gravity lands lying thereunder and has been in operation for several years but additional drain ditches are required and are being constructed from time to time as needed. Also some of the canals of said system will have to be enlarged when the North Side Extension is built in order to supply the additional amounts of water required for the North Side Pumping System. The South Side Pumping System of the Minidoka Project is under construction and partly in operation, but additional canals and ditches and enlargements are necessary for the irrigation of parts of said South Side Pumping section of the Minidoka Project. The North Side Pumping System or the North Side Extension of the Minidoka Project is not yet constructed. About ninety per cent of the said lands under said Minidoka Project and the proposed extension thereof are reserved and withdrawn public lands of the United States, the remaining ten per cent being chiefly state lands of the State of Idaho.

4. In connection with said Minidoka Project, the

Secretary of the Interior has withdrawn under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), known as the Reclamation Act, the following subdivisions of land among others and has specially reserved said lands from sale and has not restored the same to entry or sale, to wit:

Sections nineteen (19), twenty (20), and thirty (30) of Township ten (10) South, Range twenty-three (23) East, B. M., and Section twenty-five (25), Township ten (10) South, Range twenty-two (22) East, B. M., and Sections one (1), twelve (12), eleven (11), fourteen (14), Township eleven (11) South, Range twenty-two (22) East, B. M., and the State of Idaho has heretofore granted to the United States rights of way for the existing and proposed canals and ditches of said Project across all state lands on said Minidoka Project including Sections sixteen (16) and thirty-six (36) of said townships.

5. That the defendant, the Minidoka & Southwestern Railroad Company has gone upon said above described reserved lands after the withdrawal thereof and has surveyed and laid out a line of railroad across the same from Burley, in Cassia County, Idaho, in southerly direction to Oakley in Cassia County, Idaho, said railroad line and said reserved lands being more particularly shown on the attached map which is made a part of this Bill of Complaint, but the said defendant has not obtained from the United States any right of way for said railroad line across said reserved lands or any part thereof nor permission to construct the same. Neither have the surveys and plats of said proposed railroad line

been approved by the Secretary of the Interior of the United States Land Office, but the said defendants, the Minidoka & Southwestern Railroad Company and the Utah Construction Company, wrongfully and in violation of law and in violation of the rights of the complainant have gone upon said reserved and withdrawn public lands of the United States with a large force of men and teams and machinery and have let contracts for the construction of said railroad and railroad grade thereon.

6. That wrongfully and in violation of law and in violation of the rights of the complainant, the defendants herein have gone upon the reserved and withdrawn public lands of the United States described in Paragraph Four of this Bill of Complaint with large forces of men and teams and machines and are constructing and threatening to construct said railroad and railroad grade thereon and are cutting up said lands with numerous embankments, cuts, fills, and borrow pits.

7. That wrongfully and in violation of law and in violation of the rights of the complainant, the defendants herein have gone upon the ditches, canals and irrigation works of the United States on said Minidoka Project and the rights of way thereof and also upon the rights of way required for the construction of the canals and laterals which are necessary for the irrigation of the arid lands located in the said Minidoka Project and are threatening and preparing to construct said railroad and railroad grade on and across said ditches, canals and rights of way.

7½. That wrongfully and in violation of law and in violation of the rights of the complainant, the defendants are cutting up and digging out and destroying portions of the irrigable agricultural public lands of said Minidoka Project upon which the United States depends for the return of the money expended by the United States in the construction of said project and in order to furnish water to such lands. That by converting said lands into holes and fills and borrow pits, the defendants are utterly destroying portions of said land and greatly impairing the value of other portions for irrigation and agricultural purposes and for the return to the United States of the money expended for the irrigation thereof, although said lands are public lands of the United States and have been especially withdrawn and withheld from sale under authority of law for the purpose of insuring the return of such costs of construction and full compliance with all the provisions of the said Act of June 17, 1902.

That by tearing up and digging out said lands and throwing up grades and embankments thereon the defendants are obstructing and impairing the value of the rights of way for the future canals and ditches to be hereafter constructed under the authority of the United States for the irrigation and reclamation of the lands of said Minidoka Project.

That the said rights of way for said canals and ditches both present and future are west of the one hundredth meridian and are now and for more than nineteen years last past have been withdrawn and

reserved from sale by the United States under the provisions of the Act of Congress of Aug. 30, 1890 (26 Stat. L. 391) and particularly under the following section thereof:

“That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States,” and afterwards and before the defendants’ said entry and unlawful acts said lands were also withdrawn and reserved under the provisions of the said Act of June 17, 1902, hereinabove set out.

8. That the grades on many of the canals and ditches of the Minidoka Project which the said defendants are threatening to cross with their said railroad and railroad grade are very light and any obstruction or interference with the flow of the water in said canals and ditches or any loss in the surface elevation of the water in said ditches will result in throwing out of cultivation of large tracts of land which can be and now are being irrigated from said ditches and will render said tracts again a desert to the great and irreparable injury of the United States and to numerous settlers on said tracts of land.

9. That the said railroad and railroad grade will obstruct and cut off the rights of way required for the numerous additional canals and laterals and enlargements of existing canal which are necessary

for the irrigation and reclamation of the arid lands in portions of said Minidoka Project, and render it impossible to irrigate and reclaim said lands without numerous and expensive siphons and bridges, to the great and irreparable injury of the complainant.

10. That by the cutting up of said reserved public lands of the United States into cuts and embankments and borrow pits by said railroad, great and irreparable damage will be done to the complainant.

11. That by reason of the defendants' said unlawful acts the complainant has been damaged to the extent of Fifty Thousand (\$50,000.00) Dollars.

12. That there is no speedy, adequate or complete remedy at law. That the defendants are now actively engaged in the aforesaid trespass and wrongful acts and are rushing said work to completion, and unless a temporary restraining order is granted at once, said wrongful acts will be fully consummated to the irreparable injury of the complainant.

Wherefore, the complainant prays that process issue out of this court requiring the defendants to appear and to fully and truly answer all the allegations of this bill, but not on oath, answer on oath being hereby expressly waived.

That by the order of this Court the defendants and each of them and their officers, agents and employees be perpetually enjoined, prohibited and restrained from going upon said reserved lands or any part thereof or upon said canals or rights of way and from constructing or causing to be constructed

or excavated thereon any railroad or railroad grade or any cut or embankment or fill or borrow pit or any structure of any nature whatsoever.

That a temporary restraining order and an injunction as prayed for herein, issue immediately upon the filing of this complaint, and that the defendants be ordered to appear and show cause why said injunction should not be made permanent.

That the complainant have judgment against the defendants for damages as herein alleged in the sum of Fifty Thousand (\$50,000.00) Dollars and for costs of suit and for such other and further relief as to the Court shall seem equitable and just and complainant will ever pray.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho,
Boise, Idaho.

B. E. STOUTEMYER,
Attorneys for Complainant, Boise, Idaho.

State of Idaho,
County of Lincoln,—ss.

P. M. Fogg, being first duly sworn, on oath says that he is Acting Project Engineer of the United States Reclamation Service for the Minidoka Project, Idaho, and as such is the agent of the United States in charge of the Minidoka Project described in this Bill of Complaint, that he has read and knows the contents of the foregoing Bill of Complaint, and that the same is true of his own knowledge, except as to the matters herein stated to be upon information or belief and as to those matters he believes

them to be true.

P. M. FOGG.

Subscribed and sworn to before me this 17th day of December, 1909.

[Seal]

WM. LYMAN,
Notary Public.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the
Central Division of the District of Idaho.*

No. 71—IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY, THE UTAH CONSTRUCTION
COMPANY,

Defendants.

Subpoena Ad Respondendum.

The President of the United States of America to
Minidoka & Southwestern Railroad Company,
The Utah Construction Company, Greeting:

You and each of you are hereby commanded that
you be and appear in said Circuit Court of the
United States, at the courtroom thereof, in Boise
in said District, on the first Monday of February,
next, which will be the Seventh day of February,
A. D. 1910, to answer the exigency of a bill of com-
plaint exhibited and filed against you in our said

court, wherein The United States of America is complainant, and you are defendants, and further to do and receive what our said Circuit Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said District, or your deputy, to make due service of this our Writ of Subpoena and to have then and there the same.

Hereof fail not.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of our said Circuit Court affixed at Boise in said District, this 29th day of December, in the year of our Lord One Thousand Nine Hundred and nine, and of the Independence of the United States, the One Hundred and 33d.

[Seal]

A. L. RICHARDSON,
Clerk.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said Court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken *pro confesso*.

[Endorsed]: No. 71. In the Circuit Court of the United States for the Central Division of the District of Idaho. In Equity. The United States of America vs. Minidoka & Southwestern Railroad Company et al. Subpoena Ad Respondendum. Re-

The Minidoka & Southwestern R. R. Co. et al. 13
turned and filed Jan. 20, 1910. A. L. Richardson,
Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY et al.,

Defendants.

Affidavit of P. M. Fogg.

State of Idaho,
County of Lincoln,—ss.

P. M. Fogg, being first duly sworn deposes and
says:

That he is Acting Project Engineer of the U. S.
Reclamation Service, employed on the Minidoka Pro-
ject, and as such is familiar with said project and
conditions thereon.

That the Minidoka & Southwestern Railroad Com-
pany and the Utah Construction Company and
their sub-contractors, agents, and employees are
now actually engaged in grading and constructing
a railroad grade and railroad line on and across the
Minidoka Project from the town of Burley in Cassia
County, Idaho, in a southerly direction to the town
of Oakley.

That said railroad line crosses public lands of
the United States which have been withdrawn and

reserved from sale under the provisions of the Act of Congress of June 17, 1902, known as the Reclamation Act.

That the line of said railroad grade crosses numerous canals, ditches, and laterals of the United States already constructed under the authority of the United States and in operation on the Minidoka Project.

That said railroad line also crosses withdrawn public lands which constitute the right of way for the necessary canals and ditches to be hereafter constructed under the authority of the United States for the irrigation of other portions of said Minidoka Project, and without such additional ditches and canals, and enlargements of some of the existing canals the lands of some portions of said Minidoka Project will remain arid and unprofitable.

That many of the canals of said project have been run on a light grade in order to reach as large an area of high land as possible and that any obstruction or interference with the flow of water in said ditches or any form of bridge, siphon or crossing over the same which results in lowering the water level in said ditches, even to the extent of a few inches, will result in keeping out of cultivation and will render worthless large tracts of land which can now be irrigated from said ditches and some of which are already under cultivation by means of the water from said ditches.

That the construction of said railroad grade, embankments and cuts across the said reserved public lands will obstruct and cut off the rights of way

for future ditches and canals to be constructed by the United States for the irrigation of other portions of said project and which are necessary for the irrigation thereof, and will render it impossible to irrigate such lands without great expense in *construction* numerous siphons, bridges and crossings, and will also obstruct and impair the value of the rights of way especially reserved for ditches and canals constructed by authority of the United States under the provisions of the Act of Congress of Aug. 30, 1890.

That the Minidoka and Southwestern Railroad Company and the Utah Construction Company and their agents, employees, and officers and sub-contractors employed by them are cutting up and destroying and digging out and throwing up and converting into borrow pits and ridges portions of the irrigable agricultural lands of said Minidoka Project, the title to which is in the United States and upon which the United States depends for the return of the cost of construction of said project and which lands have been withdrawn and reserved under authority of law for the particular purpose of insuring the return of such cost of construction and compliance with the provisions of said Reclamation Act.

That by so tearing up and digging out said lands the defendants are destroying said lands and rendering them of little or no value for irrigation or agricultural purposes or for the return of the money expended by the United States to provide for the irrigation of such lands.

That the defendants are now actually engaged in so tearing up and digging out and destroying said land and are employing hundreds of men and teams and are very rapidly rushing said work to completion, and unless restrained by this Court and a temporary injunction is issued by this Court the said damage, destruction and trespass will go on to the great damage of the complainant, and it is most likely that said wrongful acts will be fully consummated before this cause can be heard on its merits.

P. M. FOGG.

Subscribed and sworn to before me this 17th day of December, 1909.

[Seal]

WM. LYMAN,
Notary Public.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY et al.,

Defendants.

Affidavit of L. E. Johnson.

State of Idaho,
County of Cassia,—ss.

L. E. Johnson, being first duly sworn, deposes and says:

That he is Assistant Engineer of the U. S. Reclamation Service, employed on the Minidoka Project, and as such is familiar with said project and conditions thereon.

That the Minidoka & Southwestern Railroad Company and the Utah Construction Company and their sub-contractors, agents and employees are now actually engaged in grading and constructing a railroad grade and railroad line on and across the Minidoka Project from the town of Burley, in Cassia County, Idaho, in a southerly direction to the town of Oakley.

That said railroad line crosses public lands of the United States which have been withdrawn and reserved from sale under the provisions of the Act of Congress of June 17, 1902, known as the Reclamation Act.

That the line of said railroad grade crosses numerous canals, ditches and laterals of the United States already constructed under the authority of the United States and in operation on the Minidoka Project.

That said railroad line also crosses withdrawn public lands which constitute the right of way for the necessary canals, and ditches to be hereafter

constructed under the authority of the United States for the irrigation of other portions of said Minidoka Project, and without such additional ditches and canals and enlargements of some of the existing canals the lands of some portions of said Minidoka Project will remain arid and unprofitable.

That many of the canals of said project have been run on a light grade in order to reach as large an area of high land as possible and that any obstruction or interference with the flow of water in said ditches or any form of bridge, siphon or crossing over the same which results in lowering the water level in said ditches even to the extent of a few inches will result in keeping out of cultivation and will render worthless large tracts of land which can now be irrigated from said ditches and some of which are already under cultivation by means of the water from said ditches.

That the construction of said railroad grade, embankments and cuts across the said reserved public lands will obstruct and cut off the rights of way for future ditches and canals to be constructed by the United States for the irrigation of other portions of said project and which are necessary for the irrigation thereof, and will render it impossible to irrigate such lands without great expense in *construction* numerous siphons, bridges, and crossings, and will also obstruct and impair the value of the rights of way especially reserved for ditches and canals constructed by authority of the United States under the provisions of the Act of Congress of Aug. 30, 1890.

That the Minidoka and Southwestern Railroad Company and the Utah Construction Company and their agents, employees and officers and sub-contractors employed by them are cutting up and destroying and digging out and throwing up and converting into borrow pits and ridges portions of the irrigable agricultural lands of said Minidoka Project, the title to which is in the United States and upon which the United States depends for the return of the cost of construction of said project and which lands have been withdrawn and reserved under authority of law for the particular purpose of insuring the return of such cost of construction and compliance with the provisions of said Reclamation Act.

That by so tearing up and digging out said lands the defendants are destroying said lands and rendering them of little or no value for irrigation or agricultural purposes or for the return of the money expended by the United States to provide for the irrigation of such lands.

That the defendants are now actually engaged in so tearing up and digging out and destroying said land and are employing hundreds of men and teams and are very rapidly rushing said work to completion, and unless restrained by this Court and a temporary injunction is issued by this Court the said damage, destruction and trespass will go on to the great damage of the complainant and it is most likely that said wrongful acts will be fully consummated before this cause can be heard on its merits.

L. E. JOHNSON.

Subscribed and sworn to before me this 20th day of December, 1909.

[Seal]

C. H. SCHENK,
Notary Public.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY et al.,

Defendants.

Affidavit of H. M. Schilling.

State of Idaho,
County of Cassia,—ss.

H. M. Schilling, being first duly sworn, deposes and says:

That he is Assistant Engineer of the U. S. Reclamation Service, employed on the Minidoka Project, and as such is familiar with said project and conditions thereon.

That the Minidoka & Southwestern Railroad Company and the Utah Construction Company and their sub-contractors, agents and employees are now actually engaged in grading and constructing a railroad grade and railroad line on and across the Minidoka Project from the town of Burley, in Cassia

County, Idaho, in a southerly direction to the town of Oakley.

That said railroad line crosses public lands of the United States which have been withdrawn and reserved from sale under the provisions of the Act of Congress of June 17, 1902, known as the Reclamation Act.

That the line of said railroad grade crosses numerous canals, ditches and laterals of the United States already constructed under the authority of the United States and in operation on the Minidoka Project.

That said railroad line also crosses withdrawn public lands which constitute the right of way for the necessary canals, and ditches to be hereafter constructed under the authority of the United States for the irrigation of other portions of said Minidoka Project, and without such additional ditches and canals and enlargements of some of the existing canals the lands of some portions of said Minidoka Project will remain arid and unprofitable.

That many of the canals of said project have been run on a light grade in order to reach as large an area of high land as possible and that any obstruction or interference with the flow of water in said ditches or any form of bridge, siphon or crossing over the same which results in lowering the water level in said ditches even to the extent of a few inches will result in keeping out of cultivation and will render worthless large tracts of land which can now be irrigated from said ditches and some of

which are already under cultivation by means of the water from said ditches.

That the construction of said railroad grade, embankments and cuts across the said reserved public lands will obstruct and cut off the rights of way for future ditches and canals to be constructed by the United States for the irrigation of other portions of said project and which are necessary for the irrigation thereof, and will render it impossible to irrigate such lands without great expense in *construction* numerous siphons, bridges and crossings, and will also obstruct and impair the value of the rights of way especially reserved for ditches and canals constructed by authority of the United States under the provisions of the Act of Congress of Aug. 30, 1890.

That the Minidoka and Southwestern Railroad Company and the Utah Construction Company and their agents, employees and officers and sub-contractors employed by them are cutting up and destroying and digging out and throwing up and converting into borrow pits and ridges portions of the irrigable agricultural lands of said Minidoka Project, the title to which is in the United States and upon which the United States depends for the return of the cost of construction of said project and which lands have been withdrawn and reserved under authority of law for the particular purpose of insuring the return of such cost of construction and compliance with the provisions of said Reclamation Act.

That by so tearing up and digging out said lands

the defendants are destroying said lands and rendering them of little or no value for irrigation or agricultural purposes or for the return of the money expended by the United States to provide for the irrigation of such lands.

That the defendants are now actually engaged in so tearing up and digging out and destroying said land and are employing hundreds of men and teams and are very rapidly rushing said work to completion, and unless restrained by this Court and a temporary injunction is issued by this Court the said damage, destruction and trespass will go on to the great damage of the complainant and it is most likely that said wrongful acts will be fully consummated before this cause can be heard on its merits.

H. M. SCHILLING.

Subscribed and sworn to before me this 24th day of December, 1909.

[Seal]

S. T. LOWE,
Notary Public.

My commission expires May 17, 1913.

[Endorsed]: Filed Dec. 29, 1909. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY and THE UTAH CONSTRUCTION
COMPANY,

Defendants.

Order to Appear and Show Cause.

Upon application of the complainant and upon the reading of the bill of complaint and affidavits filed in this cause, it appearing to the Court that the complainant is justly entitled to this order to appear and show cause, and that such an order is necessary and proper for the purposes of justice and for the preservation of the property in issue:

It is now hereby ordered and directed by the Court that the defendants, Minidoka & Southwestern Railroad Company and The Utah Construction Company, appear before this Court, in the courtroom in the Federal Building, in Boise, Idaho, on the seventh (7th) day of February, 1910, and show cause why an injunction should not issue and a judgment be rendered against said defendants as prayed for in the complainant's bill of complaint.

Done this 29th day of December, 1909.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Jan. 20, 1910. A. L. Richardson, Clerk.

I hereby certify that I received the within subpoena ad respondendum, together with a certified copy of the complaint, and order to show cause, at Boise, Idaho, on December 29, 1909, and that I served the same upon Minidoka & Southwestern Railroad Company by handing to and leaving with D. W. Clark, attorney for the said Minidoka & Southwestern Railroad Company, personally, a duplicate of the within subpoena ad respondendum, together with a certified copy of the complaint and copy of order to show cause, at Pocatello, Bannock County, Idaho, on January 9, 1910, the said D. W. Clark accepting service on Sunday, January 9, 1910; and I hereby further certify that I served the within subpoena ad respondendum and order to show cause upon The Utah Construction Company by handing to and leaving with I. N. Corey, the statutory agent and legal representative of the said The Utah Construction Company, personally, a duplicate of the within subpoena ad respondendum, together with a certified copy of the complaint and a copy of the order to show cause, at Rexburg, Fremont County, Idaho, on January 10, 1910.

S. L. HODGIN,
U. S. Marshal.
By E. W. Becmer,
Deputy.

Boise, Idaho, January 19, 1910.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY, THE UTAH CONSTRUCTION
COMPANY,

Defendants.

Affidavit of William Ashton.

State of Utah,

County of Salt Lake,—ss.

William Ashton, being first duly sworn, deposes and says: That he is now and has been for several years last past the Chief Engineer of the Oregon Short Line Railroad Company, a corporation of the State of Utah and owning and operating railroads within the State of Idaho; that the above-named defendant, the Minidoka & Southwestern Railroad Company is a corporation organized under the laws of Idaho in January, 1904, and that ever since its organization he has been and still is the Chief Engineer of said Minidoka & Southwestern Railroad Company; that it has constructed and is now operating a railroad beginning at Minidoka, a station on said Oregon Short Line Railroad situated in Lincoln County in said State of Idaho, and extending thence in a southwesterly and westerly direction to Burley, Twin Falls and Buhl, in the counties of Lincoln,

Cassia and Twin Falls in said State; that the said company filed its original articles of incorporation and due proofs of organization on February 15th, 1904, in the office of the Secretary of the Interior, and also filed in said office its amended articles, which cover and include a branch line from Burley to Oakley mentioned and set forth in the bill of complaint herein, on September 7th, 1909; that the said Secretary of the Interior accepted the original articles and due proofs of organization on the 4th day of April, 1904, and the said amended articles of incorporation on the 17th day of January, 1910; that the said branch line now under construction, extending from Burley station to Oakley, in Cassia County, Idaho, and being the construction referred to and set forth in the bill of complaint herein, traverses some portion of each of the said sections enumerated and set forth in Paragraph 4 of said complaint; that said construction of said branch line is being carried on under the supervision and direction of affiant as such Chief Engineer. Affiant further states that the lands traversed by said branch railroad within Section 20, Township 10 south, Range 23 west, Boise Meridian, mentioned in said complaint, was entered by James C. Bostetter under the Desert Land Law and final certificate therefor was issued January 26th, 1880; that all of the remaining lands so traversed by said branch line mentioned in the said bill of complaint, excepting Section 36 in Township 10 South, Range 22 East, Boise Meridian, have been filed upon by various settlers under the Homestead Act of the United States and the said lands are now

occupied and in the possession of the said homestead entrymen; that said Section 36 mentioned in said complaint was granted by the United States to the State of Idaho as school lands, and that the eastern half thereof, which is traversed by said branch line of railroad, has been sold and disposed of by the said State to private parties.

Affiant further says that the blue-print attached to the answer of the defendant, the Minidoka & Southwestern Railroad Company, to said bill of complaint was prepared under his direction and that the data shown thereon as to the several entries of lands traversed by said Oakley Branch of said railroad was obtained under his direction from the United States Land Office of the land district in which said lands are situated, and that the said data is, as affiant verily believes, in all respects accurate and correct. That by reason of said lands having been entered by the various entrymen as shown upon said print it became necessary for the said defendant railroad company to negotiate with and procure the right of way for said railroad through the said lands as filed upon and in possession of said settlers, and also to procure the right of way through said Section 36 so owned by private parties as successors to the interest of the said State of Idaho in said section; that the said print shows thereon all of the right of way acquired by deed, or by contract for such right of way, and that such right of way has at this time been procured from said settlers and owners with the exception of a small parcel at the northwest corner of the northeast quarter of the southeast quarter of said Section 36,

and across the northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of Section 30, being the land filed upon by Lorenzo W. Robbins, as shown upon said print, on May 19th, 1904, the land filed upon by Jacob T. Spencer crossed by said railroad, being the southwest quarter of the southeast quarter of said Section 19, and the land contained in the irregular parcel upon which the wye of said railroad is to be constructed at Burley station, and being that portion of the northwest quarter of the southeast quarter of said Section 19, lying south of the Minidoka & Southwestern Railroad as now constructed near the town of Burley; that as to the said tract of land last mentioned, belonging to D. E. Burley, and being included in the desert entry of said James C. Bostetter, that as to the right of way of said road through the said lands of said Burley, Jacob T. Spencer and Lorenzo W. Robbins, negotiations with them respectively to secure said right of way are now pending, and like negotiations are pending to secure right of way over the small tract of land traversed by said railroad situated in the northwest corner of the northeast quarter of the southeast quarter of said Section 36, and which belongs to A. W. Bishop as indicated upon said blue-print.

That the said railroad upon the said lands mentioned in said bill of complaint intersects and crosses three canals constructed by the United States and marked upon said blue-print as "1st Lift Canal," "2nd Lift Canal" and "3rd Lift Canal"; that in the construction of said railroad the said defendant has

not and will not interfere with said canals, or either of them, but on the contrary it is its intention to, and it will in the construction and completion of said road, bridge each of the said canals and carry the railroad over the same and in such manner as will not in any way interfere with or obstruct the flow of water in said canals to their full capacity; and the said railroad intends to and will in the future maintain its said bridges in such manner as in no wise to interfere with or obstruct the continuous flow of water in said canals to their full capacity.

The said defendant railroad company has not filed with the Secretary of the Interior a map of its line of railroad through said lands, for the reason that none of the said lands are public lands of the United States, and that no rights could be acquired by such filing.

This affiant further states that in the construction of said railroad it has not, so far as the grade thereof is concerned, and will not in the future, dig up, destroy or interfere with any of the surface of the said lands it traverses except to the extent necessary in constructing its grade, and that such digging and excavation will be wholly within the right of way heretofore procured by it, and for which it is negotiating, and will not in any respect whatever interfere with the said canals, or either of them, at the crossings of the same by said railroad, or in any wise weaken the banks of such canals or do any damage to the same or either of them whatsoever.

Affiant further says that the said defendant, the Utah Construction Company, have entered into a

contract with the said Minidoka & Southwestern Railroad Company to construct the grade of said Oakley Branch of said railroad company, and the work that has been done in said construction has been done by said construction company and in pursuance of a contract so entered into between the said defendants; and that the said Utah Construction Company is not otherwise connected with or in any way responsible for the said acts complained of, or any of them, except in pursuance of the construction of said branch line of railroad upon the line thereof adopted and within the rights of way owned as aforesaid by the said Minidoka & Southwestern Railroad Company procured by deed or contracted for as hereinbefore stated.

WM. ASHTON.

Subscribed and sworn to before me this 5th day of February, 1910.

[Seal]

L. B. SWANER,
Notary Public.

[Endorsed]: Filed, Feb. 7th, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY, THE UTAH CONSTRUCTION
COMPANY,
Defendants.

Affidavit of Robert B. Robinson.

State of Idaho,
County of Ada,—ss.

Robert B. Robinson, being first duly sworn, upon oath deposes and says, that he is a civil engineer, and is now, and has been since the commencement of work thereon, in charge in the field of the operations in the construction of the branch line of railroad of the Minidoka & Southwestern Railroad Company extending from Burley to Oakley, in Cassia County, Idaho; that he is engaged under the general direction of William Ashton, the chief engineer of said road, and is personally familiar with the located line and the work of construction so far as the same has progressed; that he has read the affidavit of William Ashton, chief engineer of said road, filed herein, and knows the contents thereof, and that the matters and things therein set forth are true.

Affiant further says that the work of grading upon said line was begun by the defendant, The Utah Construction Company, under contract with said railroad company, on or about November 1st, 1909, and work was actively prosecuted until on or about the 11th day of December, 1909, when it was suspended on account of the severe frosts and heavy snows, and since that time no work has been done on said line; that the lands mentioned in the bill of complaint herein extend for approximately six miles, beginning at the town of Burley and extending in a southerly direction; that no grading whatever has been done

upon the first mile, beginning at said town; that on the second mile of said line from said point seventy-four per cent of the grading has been completed; on the third mile ninety-eight per cent; on the fourth mile seventy-one per cent; on the fifth mile ninety-five per cent, and on the sixth mile eighty-four per cent.

Affiant further says that in addition to the three main canals intersected by said line of railroad and mentioned in the affidavit of said William Ashton, there are intersected by said line of railroad several laterals, all of which are encountered northerly of the third lift canal mentioned in said affidavit of William Ashton; that in the work of constructing said grade it is the intention of said company, and it will provide and maintain sufficient waterways for the free flow, without obstruction or diminution, to the full capacity of every such lateral and canal encountered in the construction of said railroad, and will permanently maintain such structures.

Affiant further says that the canals designated as the first and third lift canals are larger and broader than the second lift canal so designated; that the contemplated structures for spanning said first and third lift canals are designed to have one supporting bent of piles in the center of said canal, which line of piles it is intended to place so that it will be parallel with the direction of the flow of the water in the said canals; that the said bridges will be high enough to permit the flow of water without obstruction to the full capacity of said canals, and that the erection of said line of piles in the center of the said two canals

will not have the effect of lessening the flow of the water in the said canals.

Affiant further says that, as such engineer in charge, he gave direction before grading was begun to leave an opening for each of the canals and laterals intersected, but it is a fact, as he has since ascertained, that in the course of the construction a few of the smaller laterals have been filled up along the line of the grade by the contractors, but that before the completion thereof, and in time to prevent any obstruction of the flow therein, it is the intention of the company and it will restore the said openings to their full capacity, and proper provision will be made for the continuous flow of water in all such laterals as contemplated by the constructors of said laterals, and that such restoration and provision will be made as to every such lateral prior to the commencement of the irrigation season of 1910.

Affiant further says that he has recently communicated in writing with L. E. Johnson, assistant engineer in charge of the U. S. Reclamation Service, located at Burley, requesting him to furnish definite information as to the angle of intersection of each of said canals and laterals with the said railroad which in its construction will cross such laterals and canals, with other data showing the capacity of all such waterways, for the purpose of having a mutual understanding as to the necessary openings required in each case for the transmission underneath the said railroad track of the full capacity of each of said waterways.

Affiant further says that with the provision for the

conveying across the line of said railroad of the waters intended to be conveyed by said canals and laterals all of the land on either side of said railroad will be susceptible of irrigation, and that the construction of said railroad as contemplated will not prevent the irrigation of all or any portion of the lands to be reclaimed by said project.

ROBERT B. ROBINSON.

Subscribed and sworn to before me this 7th day of February, 1910.

A. L. RICHARDSON,
Clerk.

[Endorsed]: Filed, Feb. 7th, 1910. A. L. Richardson, Clerk.

[Answer of Minidoka etc. Co.]

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

IN EQUITY.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),

Defendants.

To the Judges of the Circuit Court of the United
States in and for the District of Idaho, Central
Division.

In answer to the bill of complaint on file herein, the Minidoka & Southwestern Railroad Company, a corporation, answers, denies and alleges as follows:

This defendant now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:

I.

That as to the facts and matters alleged in paragraph three of plaintiff's bill of complaint, defendant denies upon information and belief, that ninety per cent or any per cent in excess of ten per cent of the said lands under said Minidoka Project, or the proposed extension thereof, are reserved or withdrawn public lands of the United States, but defendant alleges the facts to be that only such part of said lands as are used for reservoirs, rights of way for ditches, and the other public works necessary for the successful and convenient operation of said reclamation project, are reserved or withdrawn public lands of the United States, all the remaining lands under said project being open to entry and sale under and in accordance with the provisions of sections 2289 and 2290 Revised Statutes of the United States, being the sections of the United States Statutes governing the disposal of public lands of the United States to homestead entrymen. Subject, however, to the additional requirement of the Reclamation Act.

II.

That as to the facts and matters alleged in paragraph four of complainant's bill of complaint, defendant denies that in connection with said Minidoka Project, or otherwise or at all, the Secretary of the Interior has withdrawn under the provisions of the Act of Congress of June 17, 1902, (32 Stat. 388) known as the Reclamation Act, or otherwise or at all, the said sub-divisions of land described in said paragraph four, or any part thereof, or has specially reserved said lands, or any part thereof from sale, or has not restored the same to entry or sale, but defendant alleges the facts to be that said sub-divisions of land at all times herein mentioned have been open to entry and sale in accordance with the provisions of said sections 2289 and 2290, Revised Statutes of the United States, subject, however, to the additional exactions of the Reclamation Act.

Defendant denies that Sections 19, 20, and 30 of Township Ten (10) South, Range Twenty-three (23) East of Boise Meridian, and Section 25, Township Ten (10) South, Range Twenty-two (22) East Boise Meridian, and Sections 1, 12, 11 and 14, Township Eleven (11) South, Range Twenty-two (22) East, Boise Meridian, or any or either of said sections, or any part of any or either of said sections has been specially or at all reserved from sale; and defendant denies that said land is not open to sale or entry, but defendant alleges the fact to be that the said land is open to sale and entry as hereinbefore alleged.

III.

That as to the allegations contained in paragraph

five of complainant's bill of complaint, defendant denies that it has gone upon any reserved lands of the United States either before or after the withdrawal thereof, or at all, or has laid out a line of railroad across any reserved lands from Burley in Cassia County, Idaho, in a southerly direction to Oakley in Cassia County, Idaho, or at any other place.

Defendant denies that said lands shown on the map attached to and made a part of the bill of complaint was at the time of the commencement of this action, reserved land or land withdrawn from sale.

Defendant denies that it has not obtained from the United States any right of way for a railroad across said described lands, but alleges that so far as the complainant has any right in and to said lands; or any part thereof, said Minidoka & Southwestern Railroad Company has acquired a right of way for a railroad over the same under and by virtue of, and pursuant to the Act of March 3, 1875, an act entitled, "An Act granting to railroads the right of way through the public lands of the United States, approved March 3rd, 1875."

Defendant denies that the Minidoka & Southwestern Railroad Company, or the Utah Construction Company, wrongfully or in violation of law, or in violation of the rights of the complainant, or at all, have gone upon any reserved or withdrawn public land of the United States with a large force, or any force of men, or teams, or machinery, or have let contracts for the construction of any of said or any railroad grade or any grade thereon, or at all.

IV.

For answer to paragraph six of said bill of complaint defendant denies that it has wrongfully or in violation of law, or in violation of the rights of complainant, gone upon any reserved or withdrawn public lands of the United States described in paragraph four of this bill, or any portion thereof, or any land.

Defendant denies that it has with a large or any force of men, or teams, or machinery, or at all, gone upon any reserved or withdrawn public lands of the United States as described in complainant's bill of complaint, or at all, or is constructing or threatening to construct any railroad, or railroad grade thereon, or is cutting up said lands, or any lands with numerous or other embankments, or cuts, or fills, or borrow pits, or otherwise or at all.

V.

Defendant denies that it has wrongfully or in violation of law, or in violation of any rights of the complainant, or at all, gone upon any ditches or ditch, or canals or canal, or irrigation works or work of the United States on said Minidoka Project, or rights of way therefor, or upon any rights of way, or right of way acquired for the construction of any canals or canal, or laterals or lateral, which are necessary for the irrigation of any lands located in said Minidoka Project, or at all.

Defendant denies that it is threatening or preparing to construct said or any railroad or railroad grade in any way so as to interfere with any ditches or ditch, or canals or canal, or right of way of the complainant, or any other person.

VI.

Defendant denies that it is wrongfully or in violation of law, or in violation of the rights of the complainant, cutting or digging up or destroying any proportion of any irrigable or agricultural public lands of the said Minidoka Project, or upon which the United States depends for the return of any money expended by the United States in the construction of said or any project, or in any way interfering with the United States in its purpose of furnishing water to said or any lands, except as hereinafter alleged.

Defendant denies that it is converting said or any lands, or any part thereof, into holes, or fills, or borrow pits, except as hereinafter alleged.

VII.

Defendant denies that it is utterly or at all destroying any portions or portion of said land, or greatly or at all impairing the value of any portion of said land for irrigation or agricultural purposes, or for any purpose, or for the purpose of the return to the United States of any money expended for the irrigation thereof.

Defendant denies that said lands or any of said land described in complainant's bill of complaint has been specially or at all withdrawn or withheld from sale under the authority of any law, or at all, or for the purpose of insuring the return of any cost of construction, or for full compliance with any provisions of the Act of June 17, 1902, or otherwise or at all.

VIII.

Defendant denies that by any act of this defendant,

or by the tearing up or digging out of said lands, or any part thereof, or by throwing up grades or embankments thereon, or at all, the defendant is obstructing or impairing the value of any rights of way for any future canals or ditches to be hereafter constructed under the authority of the United States, or at all, for the irrigation or reclamation of lands of the said Minidoka Project, or any other lands or at all.

IX.

Defendant denies that any rights of way for canals or ditches either present or future have for more than nineteen (19) years last past, or for any other period of time, or at all, been withdrawn or reserved from sale by the United States under the provisions of the Act of Congress of August 30, 1899 (26 Stat. at Large, 319), or otherwise or at all, or under the provisions of the section of said United States statute set out in paragraph seven of complainant's bill of complaint.

X.

That as to the allegations contained in paragraph eight of complainant's bill of complaint, this defendant has no knowledge, information or belief sufficient to enable it to answer the same, and placing its denial upon that ground it denies that the grades of any canals or ditches of the Minidoka Project which this defendant is threatening to cross, or is crossing with its said or any railroad, or railroad grade, are very light; and upon the same ground defendant denies that any obstruction or interference with the flow of the water in said canals or ditches, or any loss in

surface elevation of water in said ditches will result in throwing out of cultivation large or any tracts of land which can be, or are now being irrigated from said ditches, or will render said or any tracts of land desert, or will cause the United States or any of the settlers on said tracts of land, or any of them, great or irreparable or any injury.

XI.

Defendant denies that said or any railroad, or railroad grade will obstruct or cut off any rights of way required for additional canals or laterals, or will obstruct or cut off any enlargements of existing canals or laterals where they are necessary for the irrigation or reclamation of any arid lands in any portion of said Minidoka Project, or render it impossible to irrigate or reclaim said lands or any part thereof without numerous or expensive syphons or bridges, or at all; defendant denies that said railroad or any railroad grade will obstruct or cut off any rights of way or canals or laterals, or ditches of the complainant, or cause the complainant great or irreparable or any injury.

XII.

Defendant denies that it is cutting up any reserved public lands of the United States, or that by any of its acts in cutting up any of the lands described in complainant's bill of complaint, into cuts, or embankments, or borrow pits, the complainant will suffer great or irreparable damage, or any damage at all.

XIII.

Defendant denies that by reason of any unlawful acts or any acts or act of the defendants, or either

of them, complainant has been damaged to the extent of Fifty Thousand (\$50,000.00) Dollars, or any other sum or amount at all.

XIV.

Defendant denies that complainant has no specific or adequate or complete remedy at law, and denies that it is now engaged in any trespasses or wrongful acts as alleged or at all, or that it is rushing said work to completion, except as hereinafter alleged.

XV.

Defendant denies that unless a temporary restraining order is granted at once, or at all, any wrongful acts of the defendants or either of them, will be fully or at all consummated, or that complainant will suffer any irreparable or other injury.

XVI.

For further answer to complainant's bill of complaint, and by way of defense thereto, this defendant alleges:

I.

That the defendant, the Minidoka & Southwestern Railroad Company is a corporation duly organized and existing under and by virtue of and pursuant to the laws of the State of Idaho, with its principal place of business at the city of Pocatello, Bannock County, Idaho, the object and purpose of its organization being to construct, own and maintain a railroad and operate the same by steam or other motive power, with such branch lines and extensions as may from time to time be deemed desirable and expedient, and as may be authorized by law. Said railroad as now constructed begins at the station of Minidoka in

Lincoln County, Idaho, and extends in a general southwesterly direction passing through the town of Burley to the town of Buhl, in Twin Falls County, Idaho, said Minidoka & Southwestern Railroad Company is further authorized and empowered under its articles of incorporation, to construct, maintain and operate a line of railroad beginning at a point near Burley station in Cassia County, Idaho, and extending thence in a southerly direction through Cassia County to Oakley, in said Cassia County, Idaho.

II.

That the defendant, The Utah Construction Company is a corporation organized and existing under and by virtue of the laws of the State of Utah, and doing business within the State of Idaho, and as such corporation is engaged in a general contracting business, and as such contractors and not otherwise, are engaged under the direction of the said Minidoka & Southwestern Railroad Company in constructing upon the right of way hereinafter described owned by said Minidoka & Southwestern Railroad Company, a grade upon which to lay a railroad track to be used by said Minidoka & Southwestern Railroad Company in the operation of trains between said station of Burley and said station of Oakley.

III.

That prior to the commencement of this action, and prior to the commencement of the construction of said railroad, and railroad grade, leading from Burley to Oakley, the said Minidoka & Southwestern Railroad Company fully and duly complied with the constitution and laws of the State of Idaho relating

to the organization, existence and management of railroad corporations, and of the right and authority of such corporations to acquire and hold rights of way and other property necessary for the construction and operation of railroads.

IV.

That said Minidoka & Southwestern Railroad Company has constructed and now owns a steam railroad, which said road is operated by the Oregon Short Line Railroad Company for the carriage and transportation of passengers and freight and United States mail from Minidoka, Idaho, to Buhl, in Twin Falls County, Idaho, and said Minidoka & Southwestern Railroad Company desires to maintain and operate a steam railroad for the carriage and transportation of passengers and freight and United States mail in connection with and as a part of the line of railroad now maintained and operated as aforesaid, said road to extend from Burley, Cassia County, Idaho, in a southerly direction through said Cassia County to Oakley in said county and State.

V.

That said defendant, Minidoka & Southwestern Railroad Company, has already received proper conveyances of title to practically all of the right of way which it needs for said railroad from Burley to Oakley, and is now engaged in constructing on right of way, a railroad grade, embankment and track to be used as aforesaid, said right of way upon which said railroad is being constructed being located as shown upon the blue-print map hereto attached and marked Exhibit "A."

VI.

That prior to the commencement of this action, and prior to the commencement of the construction of said railroad, said Minidoka & Southwestern Railroad Company filed with the Secretary of the Interior, a copy of its articles of incorporation, and due proof of its organization under the same, which were accepted and approved by the Honorable Secretary of the Interior, and which are, as defendants are informed and believes, and therefore allege, still on file with the Secretary of the Interior.

VII.

That said Minidoka & Southwestern Railroad Company has surveyed the definite line of its proposed railroad over each of the tracts of land described in the complainant's bill of complaint in the manner customary in surveying and marking lands for lines of railroad, and has caused a map to be prepared of said right of way showing the general route of said road where the same passes over the lands described in complainant's bill of complaint; said survey and map having been made long prior to the commencement of this action. A blue-print of said map where the same passes over said land, marked Exhibit "A," is hereto attached and made a part hereof, and said route as shown upon said map was duly and regularly adopted prior to the commencement of this action, by said Minidoka & Southwestern Railroad Company, and it is upon said route as so surveyed and adopted where the same passes over said described lands, that these defendants were at the time of the commencement of this action, and

still are engaged in constructing a railroad track and roadbed, and it is the construction of said railroad at said place which the complainant in this action seeks to enjoin.

VIII.

That the defendant herein, Minidoka & Southwestern Railroad Company, is now and was prior to the commencement of this action, pursuant to law, and in furtherance of its purpose aforesaid to construct, own and operate a line of railroad from Burley to Oakley, engaged in constructing a railroad grade, and in constructing its railroad over the lands described in complainant's bill of complaint as shown by the blue-print map attached hereto; and prior to the commencement of this action, and prior to the commencement of the work of constructing said railroad as herein alleged, all of said lands described in complainant's bill of complaint over which said Minidoka & Southwestern Railroad Company's line of road extends, and is being constructed as aforesaid, and all of the land claimed by it for a right of way for such railroad, was segregated from the public domain and filed upon by homestead entrymen under and by virtue of and pursuant to, and in accordance with the provisions of the United States statutes governing homestead entries, subject to the additional exactions of the reclamation act mentioned in complainant's bill of complaint, said lands all being situated within the boundary lines of said Minidoka Irrigation Project as designated by the Secretary of the Interior, and the defendant, the Minidoka & Southwestern Railroad company, has

obtained by contract from practically all of the homestead entrymen over whose entries said railroad is being constructed, the right to construct its said railroad over and across said lands, at the place shown on the blue-print map hereto attached, the right of way so granted being _____ feet wide, and said defendant, The Minidoka & Southwestern Railroad Company is now engaged in acquiring rights from those entrymen from whom such rights have not yet been secured, and it is upon this right of way so obtained, and not elsewhere, that the Minidoka & Southwestern Railroad Company is constructing the railroad described in the complainant's bill of complaint, and which the complainant in this action seeks to enjoin.

X.

Defendant further alleges according to its information and belief, that at the time of the commencement of the construction of said railroad, and at the present time, no part of said right of way where it crosses the said described lands, was or is occupied by the United States of America by having laid out or constructed thereon irrigation ditches, ways or works; and further in that regard defendant alleges that it is not necessary for complainant to have, in order to properly construct and maintain and operate its said reclamation project, said proposed right of way claimed by the defendant, the Minidoka & Southwestern Railroad Company, or any part thereof, but said complainant without appreciable inconvenience can construct any necessary canals or irrigation ways or works for the irrigation of said

lands, on lands adjacent to said right of way, and in such a way as not to interfere or conflict with the rights of the defendant, the Minidoka & Southwestern Railroad Company in and to said right of way.

Wherefore this defendant having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of complaint material to be answered according to its best knowledge and belief, humbly prays this Honorable Court to enter its decree that this defendant be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained, and for such other and further relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

MINIDOKA & SOUTHWESTERN RAIL-
ROAD COMPANY,

By P. L. WILLIAMS,

General Atty.,

Respondent.

P. L. WILLIAMS,

D. WORTH CLARK,

Solicitors for Respondents.

Residence and P. O. Address of D. Worth Clark,
Pocatello, Idaho.

State of Idaho,

County of Bannock,—ss.

W. H. Jones being first duly sworn deposes and says that he is a director of the Minidoka & Southwestern Railroad Company, one of the respondents above named, and is the only officer of said defendant company residing in the State of Idaho; that he

has read the above and foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to on information or belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me this —— day of February, 1910.

I hereby certify that the foregoing answer is in my opinion well founded in point of law.

Dated this 7 day of February, 1910.

D. WORTH CLARK,
Of Counsel for Respondent.

[Endorsed]: Filed, February 7th, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY and THE UTAH CONSTRUCTION
COMPANY,

Defendants.

**Separate Answer of The Utah Construction
Company.**

The defendant, The Utah Construction Company, for separate answer to the bill of complaint of the complainant herein, says:

1st. That it is a corporation organized and existing under the laws of the State of Utah, and engaged in the business of building and constructing railroads and other similar work.

2nd. This defendant has not any knowledge, information or belief as to whether the lands mentioned in said bill of complaint or any of them have lawfully or at all been withdrawn by the complainant, as alleged in its bill of complaint, and for that reason cannot answer thereto.

3rd. That heretofore and prior to the commencement of this suit it entered into a contract with the defendant, Minidoka & Southwestern Railroad Company, whereby it agreed to construct for said railroad company the roadbed for a railroad over the lands mentioned in said bill of complaint upon the line indicated on the map attached to said bill of complaint, under the direction and supervision of said railroad company.

4th. That under and by virtue of said contract and by the direction of said railroad company, and not otherwise, this defendant entered upon the lands in question for the purpose of constructing the roadbed for a railroad over said lands as aforesaid, as it believed it had the right to do.

5th. This defendant denies that any such entry on said lands for the purpose aforesaid was wrongful or in violation of law or in violation of the rights of the complainant, and denies that any of the acts alleged in paragraphs 5, 6, 7 and 7½ of said bill of complaint to have been done by it were wrongful or

in violation of law or of the rights of the complainant.

ANDREW HOWAT and
H. R. MACMILLAN,
Solicitors for the Defendant, The Utah Construction Company.

[Endorsed]: Filed Feb. 7, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

IN EQUITY—No. —.

THE UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),

Defendants.

Replication [Filed February 7, 1910].

This replicant saving and reserving to himself all and any manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto, saith, that he doth and will ever maintain and prove his said bill to be true and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law, to be replied unto by this repliant;

without that, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

C. H. LINGENFELTER,

U. S. Attorney for the District of Idaho, Boise,
Idaho.

B. E. STOUTEMYER,

Attorney, U. S. R. S., Boise, Idaho.

I admit receipt of a copy of the above this 7th day of Feb., 1910.

P. L. WILLIAMS,

D. WORTH CLARK,

Solicitors for Above Defendants.

[Endorsed]: Filed, Feb. 7, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation) and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),

Defendants.

Affidavit of B. E. Stoutemyer.

County of Ada,
State of Idaho,—ss.

B. E. Stoutemyer, being first duly sworn deposes and says that the copy of the telegram attached hereto and marked Exhibit "A" is an exact copy of the telegram sent by him to the Director of the United States Reclamation Service on February 7th, 1910, in regard to the status of the articles, profiles and maps of the Minidoka & Southwestern Railroad Company before the Department and that the telegram attached hereto and marked Exhibit "B" is the original telegram received on February 8th, 1910, in reply to the telegram marked Exhibit "A."

B. E. STOUTEMYER.

Subscribed and sworn to before me this 8th day of Feb., 1910.

[Seal]

EMMA JACOBSON,
Notary Public.

Exhibit "A."

Gov't Paid.

Boise, Idaho, Feb. 7, 1910.

Director Reclamation Service,
Washington, D. C.

Chief Engineer Minidoka Southwestern Railroad filed affidavit that Secretary Interior accepted company's amended articles including Burley Oakley Line January seventeenth. Have wire sent us today whether true also as to profile or map Hearing to-

morrow morning on injunction.

STOUTEMYER.

Exhibit "B."

Paid Night, Gov't.

Washington D. C. Feb. 7th, 1910.

Stoutemyer.

Reclamation, Boise, Idaho.

Your telegram seventh Amended articles Minidoka Southwestern approved by Secretary January seventeenth but apparently do not include line Burley to Oakley. Approval of articles only preliminary to grant of right of way which only became effective upon approval of a map or upon construction.

NEWELL.

[Endorsed]: Filed Feb. 8, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY, (a
Corporation),

Defendants.

Affidavit of F. E. Weymouth.

County of Ada,
State of Idaho,—ss.

F. E. Weymouth, being first duly sworn deposes and says that he is now and for more than a year last past has been the Supervising Engineer of the United States Reclamation Service in the State of Idaho and as such is in charge of all of the work of the Reclamation Service in the State of Idaho, including the Minidoka Project. That he is familiar with said Minidoka Project and that section of said Minidoka Project which is known as the South Side Minidoka Pumping Project.

That the lands described in the complainant's bill of complaint herein as the lands which are being crossed by the defendant's said railroad line from Burley to Oakley, Idaho, to wit:

Sections 19, 20 and 30 of Twp. 10 S., Range 23 East, B. M. and Section 25, Twp. 10 S., Range 22 East, B. M., and Sections 1, 11, 12, and 14, Twp. 11 S., Range 22 East, B. M., are a part of that section of said Minidoka Project which is known as the South Side Minidoka Pumping Project.

That the Secretary of the Interior has not yet issued the public notice provided for in section four (4) of the Reclamation Act of June 17, 1902, for said South Side Minidoka Pumping Project nor any part thereof neither has he announced the charges which shall be made per acre upon the entries nor the number of annual installments.

That said lands have been withdrawn from entry by the Secretary of the Interior under the second form of withdrawal authorized by section three (3) of said Reclamation Act, a certified copy of which order of withdrawal is hereto attached and made a part of this affidavit, and that said withdrawn lands have not been restored to entry. That said lands have been entered since withdrawal by various homestead entrymen under the provisions of the Homestead Law, subject to all the conditions, provisions and restrictions of said Reclamation Act of June 17, 1902, but that said entrymen have not yet paid any part or installment of the charges which shall be made per acre upon said entries under the provisions of section four (4) of said Reclamation Act nor have they completed the residence and cultivation required by the Reclamation and Homestead Acts.

F. E. WEYMOUTH.

Subscribed and sworn to before me this 8th day of February, 1910.

[Seal]

EMMA JACOBSON,
Notary Public.

DEPARTMENT OF THE INTERIOR.
UNITED STATES LAND OFFICE,

Hailey, Idaho, January 11, 1910.

Mr. F. E. Weymouth,
Supervising Engineer,
Boise, Idaho.

Sir: We are in receipt of your letter of the 27th ult., file 216-A, BES-FH, requesting us to send you certified copies of the orders of withdrawal covering the lands in the South Side Minidoka Project in

Cassia Co., on the South Side of Snake River, and in reply, we enclose herewith copy of letter from Assistant Commissioner W. A. Richards, under date of November 20, 1902, giving the data requested.

Very respectfully,

A. I. McMAHON,

Register.

FRED W. BRADLEY,

Receiver.

AIM—ow

A. W. B.

C. L. D. B.

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

191108-1902

Washington, D. C., November 20, 1902.

Subject: Withdrawal for Irrigation Plans.

Register and Receiver,

U. S. Land Office,

Hailey, Idaho.

Sirs: The Secretary of the Interior, by his order dated November 17, 1902, has directed that the lands in the following named townships be withdrawn temporarily from entry, except under the homestead laws, provided that all lands entered and entries made under the homestead laws within the areas hereby withdrawn, during such withdrawal, shall be subject to all the provisions, limitations, charges, terms and conditions of the Act of June 17, 1902.

Ts. 8 S., Rs. 24 to 29 E., inclusive, B. M.

“ 9 “ “ 19 to 29 “ “ “ “

“ 10 “ “ 19 to 28 “ “ “ “

“ 11 “ “ 19 to 25 “ “ “ “

You will therefore make the proper entries on your records and acknowledge receipt.

Very respectfully,
(Signed) W. A. RICHARDS,
Assistant Commissioner.

DEPARTMENT OF THE INTERIOR.
UNITED STATES LAND OFFICE.

We hereby certify that the fore-going is a true and correct copy of letter "E", dated November 20, 1902, of the Assistant Commissioner of the General Land Office, as the same appears on file in this office.

WITNESS my hand this 12th day of January, 1910.

A. I. McMAHON
Register.

[Endorsed]: Filed Feb. 8, 1910, A. L. Richardson,
Clerk.

Journal Entry.

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Boise, Idaho, on Tuesday, the 8th day of February, 1910. Present, Hon. FRANK S. DIETRICH, Judge.

[Order of Submission.]

No. 71.

THE UNITED STATES

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
CO. et al.

On this day this cause came on to be heard upon

the order to show cause why an injunction should not be issued herein. C. H. Lingenfelter, U. S. District Attorney, and B. E. Stoutemyer, Atty. for the Reclamation Service appearing as counsel on behalf of plaintiff, and P. L. Williams and D. Worth Clark, Esqs., appearing as counsel on behalf of defendants, and after argument by the respective counsel said matter was submitted and taken under advisement by the Court.

*In the Circuit Court of the United States in and for
the Central Division of the District of Idaho.*

Dated February 8, 1910.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY, and THE UTAH CONSTRUCTION
COMPANY,

Defendants.

Opinion on Application for Temporary Injunction.

C. H. LINGENFELTER, U. S. Attorney, and
B. E. STOUTEMYER,

Attorneys for Complainant,

P. L. WILLIAMS and D. WORTH CLARK,
Attorneys for Defendants.

DISTRICH, District Judge.—This is an application for a temporary injunction, restraining the defendant from completing the construction of its railroad across certain lands and canals embraced in the Minidoka Reclamation Project, in Cassia County,

Idaho. The substantial facts are not in dispute, and the questions of law arise upon the construction and application of the general Railroad Right of Way Act, of March 3, 1875 (18 Stat. L. 482), granting to railroad corporations rights of way through "the public lands of the United States"; a paragraph of the general Appropriation Act, approved August 30, 1890 (26 Stat. L. 391), providing:

"That in all patents for lands hereinafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States";

an act amending section 2288 of the Revised Statutes of the United States, approved March 3, 1905 (33 Stat. L. 991), which is as follows:

"Any *bona fide* settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim";

and the Reclamation Act, approved June 17, 1902 (32 Stat. L. 388).

The Reclamation Act, appropriating for the irri-

gation of arid lands in certain states and territories, the proceeds of the sales of public lands situate therein, directs the Secretary of the Interior to cause examinations and surveys to be made for the purpose of determining the feasibility of any given project, and authorize him to "withdraw from public entry the lands required for any irrigation works contemplated" under its provisions; and it further authorizes him, "at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works." It is also provided that public lands which it is proposed to irrigate "shall be subject to entry only under the provisions of the homestead laws, in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms and conditions" in the act prescribed. These terms and limitations are, that the Secretary of the Interior may confine the entry of any one person to such an area, not less than forty nor more than one hundred and sixty acres, as in his opinion may be reasonably required for the support of a family; that the commutation provisions of the general homestead laws shall not apply; that the entryman shall pay, in the manner and at the times prescribed by the Secretary of the Interior, a ratable proportion of the cost of the irrigation works; and that he shall pay the charges for construction of the irrigation works apportioned against his tract, and reclaim at least one-half of the total irrigable area of his entry for

agricultural purposes, before receiving patent.

It will be observed that the act provides for two different "withdrawals" or "reservations," to be made by the Secretary of the Interior. As is said in *United States vs. Hansen*, 167 Fed. 881: "It provides, first, that the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc. No exception whatever is expressed as to the lands which are to be withdrawn for these purposes. It provides, second, for the withdrawal of any other public lands 'believed to be susceptible of irrigation from said works.' Such lands are to be withdrawn from entry, 'except under the homestead laws.' "

Briefly, and omitting the recital of dates and details, the facts are that prior to the organization of the defendant railroad company the Secretary of the Interior, acting under authority of the Reclamation Act, established the Minidoka Project, and entered upon the construction of the works for the irrigation of the lands embraced therein. Certain lands were withdrawn or reserved for the use of the Government, for its dams, pumping plant, canals, and other structures; but none of the lands so reserved are here involved. There were also withdrawn from entry, "except under the homestead laws," other public lands, aggregating a large area, "believed to be susceptible of irrigation" from the contemplated works. Soon thereafter all the lands of the latter class were entered by qualified persons under the provisions of the general homestead law,

modified and limited, as hereinbefore stated, by the Reclamation Act. These entries were made at various dates, some of them several years prior to the commencement of this action, but none of them have as yet progressed to final proof or patent. The defendant railroad company projected a branch road, connecting with an existing line at the town of Burley, and traversing in its course for a distance of approximately six miles lands thus covered by homestead entries, and in the possession of the several entrymen; and also intersecting three of the Project canals, constructed and controlled by the Reclamation Service. Apparently for the purpose of claiming some benefit under the Railroad Right of Way Act of March 3, 1875, prior to the commencement of this suit and after the definite location of its line of road, the railroad company filed with the Secretary of the Interior a copy of its articles of incorporation and proofs of its organization under the same; it has not, however, filed any profile map with the register of the local land office. Recognizing the possession and rights of the homestead entrymen, the defendant, before it commenced to grade its roadbed, much work upon which has now been done, negotiated with the entrymen, and, by purchase, secured from them, so far as lay within their power to grant, the desired right of way. There are two or three entrymen with whom negotiations are still pending, but that fact is unimportant, for the entrymen are not complaining and the defendant fully concedes the necessity of extinguishing their claims, either by purchase or by proceedings in eminent domain. There has been no

interference by the defendant with the complainant's canals, and there is a disavowal of any purpose or intent to make or to claim the right to make any crossing which will diminish their capacity or impair their safety, or materially restrict the complainant's management and control thereof.

From this brief statement, it is apparent that complainant's application for injunctive relief rests upon two classes of property rights which, it is alleged, the defendant is threatening to invade; its interest in the lands which are in the possession of the several entrymen, but to which it holds the legal title, and its rights in the canals which it has constructed across these lands, and of which it has the exclusive possession. First, as to the lands.

At the argument there was considerable discussion touching the question whether or not lands withdrawn under the Reclamation Act from entry, "except under the homestead laws," are subject to the operation of the Railroad Right of Way Act of March 3, 1875, the plaintiff affirming and the defendant denying that such lands are within the exception of section 5, which provides that the act shall not apply to "lands especially reserved from sale." But the question does not seem to be pertinent at the present juncture, for whatever may be the legal status of the lands so withdrawn under the Reclamation Act, after withdrawal and prior to entry, all of the lands here involved rest under valid subsisting homestead filings, and being, therefore, no longer "public lands," they are exempt from the operation of the Right of Way Act, which, by its express terms,

is made applicable only to "public lands of the United States." (Bardon vs. Northern Pacific Railroad Co., 145 U. S. 535.) And whether we take the one view or the other of the ensuing rights of the parties, when and in the contingency that a present entryman shall forfeit or abandon his entry covering lands traversed by the defendant's railroad, the anticipation of such a possible occurrence furnishes no substantial basis for present injunctive relief. In either view the rights of the railroad company upon the happening of such a contingency would be measured by the law; they will not be enlarged by the possession of the railroad company, however long continued, for, as against the Government, neither acquiescence nor lapse of time may be pleaded in bar. It follows that if the Right of Way Act does not become applicable upon the cancellation of an existing entry, and if the railroad company holds under no other pertinent provision of law, the plaintiff may, as soon as the land is released from entry, without prejudice assert all the rights of an owner against one who, without right, holds possession of its property. If, upon the other hand, the Right of Way Act will, in such a contingency, operate to effect a grant of the right of way to the defendant, a court of equity, without other reason for so doing, cannot at this time properly enjoin the defendant from putting itself in a position where it may, without wrongdoing, secure the benefits of a valid law.

The primary inquiry, therefore, relates to the present, rather than the future rights of the several parties in interest—such rights as are created and

defined by the acts hereinbefore referred to, exclusive of the Railroad Right of Way Act. I say the several parties in interest, because while the controversy is, in form, between the Government and the railroad company, its adjudication necessarily involves a consideration of the rights of the homestead settlers, who have entered the lands and assumed certain obligations, and who, in turn, are entitled to receive such reciprocal benefits and to exercise such valuable privileges as are provided for by law. And, as will presently appear, between an entry subject to legal limitations, such as are implied by the complainant's contention, and an entry measuring up to the defendant's view of the law, there is a distinction which the entryman may not unreasonably regard as highly material.

The original homestead law was enacted for the purpose of encouraging settlement upon the public domain, the essential conditions to the acquisition of title being that the entryman should make his home upon the land, and improve and cultivate it. Right of possession and the duty of occupation follow the initiation of the entry, and from that time until the title is fully earned, the entryman may make such uses of the land as are within the spirit and general purpose of the homestead law, all the time with due regard to the rights of the Government, still the owner of the principal estate. The entryman may not commit waste or use the resources of the land except in so far as may be reasonably necessary to effect the lawful object of his possession, nor may he occupy the land or permit its occupancy for a pur-

pose inconsistent with the general purpose of tillage and home making. By strict requirement, the entry can be made only for the use and benefit of the entryman, and is nontransferable; nor may any part of the entry be alienated, either by voluntary contract or by judicial sale. It follows that under the law as originally enacted the entryman could not legally use or permit another to use any part of his entry for railroad purposes, nor could he make a conveyance for such purpose. The practical necessity for making certain exceptions to these rigid restrictions upon the power of the entryman must have soon become apparent, and was doubtless brought to the attention of Congress, for we find that by the act of March 3, 1873 (R. S. U. S. 2288), the entryman was authorized to transfer by warranty against his own acts any portion of his entry, for church, cemetery or school purposes, and for the right of way of railroads, all of which, as appears from the statute, were deemed to be "public purposes"; and later, by the amendatory act of March 3, 1895, authority to transfer was extended to rights of way for telegraph and telephone lines, and for irrigation canals and reservoirs, which are also declared to be public purposes. And if we will but for a moment contemplate the plight of a community made up of settlers upon public lands entered under the homestead laws, where no one has the power to convey or to acquire a site for a schoolhouse or a church or a cemetery, or a right of way for a railroad or a telegraph or telephone line, or, in an arid region, for an irrigating ditch, both the reasons for this legislation and the

objects and purposes thereof will clearly appear.

By its express terms the act confers upon "any *bona fide* settler under the pre-emption, homestead or other settlement law," the right to transfer for a railroad right of way, and while its application to an entry under the homestead law, as modified by the Reclamation Act, is here apparently denied by the Government, no good reason is offered, and, as I view it, no substantial reason can be brought forward for refusing such an entryman the benefit thereof. In terms the act is all inclusive, for even were the suggestion of counsel for the Government to be adopted, that the entries under consideration are not, strictly speaking, to be deemed homestead entries, we still have the express provision that "any *bona fide* settler under (any) other settlement law; may make a transfer; and this declaration is, beyond all peradventure, broad enough to include the entrymen of the lands in question. Moreover, if by reason of any ambiguity the language of the act were subject to construction, no reason is to be found in the general policies of the Government, or in the scope and purpose of the Reclamation Act, for narrowly construing this law, to the exclusion of entries within reclamation projects. The purpose of the Reclamation Act is identical with that of the original Homestead Act; it is but an adaptation of the original act to conditions not in contemplation at the time of the earlier legislation. It encourages and makes possible the settlement and tillage of large tracts of public lands, and, to say the least, it is quite as important that settlers upon such

lands, as that settlers upon lands more easily reclaimed and improved, have schools, churches, cemeteries, telephones, telegraphs and convenient means of transportation. Yet it was practically conceded at the argument by counsel for the Government that if the settlers here cannot, by their consent, authorize the construction of a railroad across their several entries, then there is no way provided by law by which such right may be granted, for if, as is contended on behalf of the Government, and as is here held, the general Right of Way Act of March 3, 1875, is not applicable under the existing conditions, and if the act now under consideration is likewise inapplicable, then, as far as I am advised, there is no law either granting a right of way or vesting in any officer or department the authority or discretion to make a grant of such a right of way, or legally to consent to occupancy for such purpose. And it follows that if the settlers have not the power to grant such right of way for railroad purposes, neither have they the power to convey sites for schoolhouses or churches or cemeteries, or rights of way for ditches or for telegraph or telephone lines.

If then, as I think must be held, the entrymen here are entitled to the full benefit of this legislation, it is proper next to consider the nature and effect of an authorized conveyance for one of the public purposes specified in the law. It is, of course, possible so literally to construe the law as to confine the operation of the conveyance therein provided for, strictly to the entryman's estate. Such a construction would, however, necessarily imply that the entryman

is simply authorized to execute a worthless instrument, for the grantee could not obtain any benefits thereunder without first extinguishing the rights and divesting the title of the Government, conditions with which it is admittedly impossible to comply. The entryman could convey a site for a schoolhouse, but actual use of such site for school purposes would constitute a trespass against the United States; and settlers might convey a right of way for a railroad, but it would be unlawful for the grantee to construct a roadbed and lay a railroad track thereon. Is it to be supposed that Congress intended thus to 'keep the word of promise to the ear and break it to the hope'? The law must receive a sensible construction, to the end that its underlying purpose may be given practical effect and its general objects accomplished. As has already been stated, this legislation was first enacted in 1873; and soon thereafter, in 1875, Congress passed the general Right of Way Act, providing for the acquisition of rights of way across public lands and over possessory claims upon public lands. Appreciating the desirability, if not the necessity, of having railroads penetrate and traverse the public domain upon which settlement was being encouraged, Congress doubtless purposed, by these acts, to make ample provision for the acquisition of rights of way across all lands (excepting those reserved for special purposes) in which it had any interest and which would be encountered in making the desired extensions of railroad lines. It is reasonable to assume that the two acts were deemed to be sufficient to accomplish this purpose. By the

act of March 3, 1875, it expressed its willingness freely to grant such rights of way over lands where the Government was the owner of the entire interest, and there is no reasonable ground to suppose that it was unwilling to grant similar rights of way over lands in which the interest of the Government was limited. And it is further to be remarked that if, at the time of the passage of the act of 1875, it was understood that the act of 1873, together with conveyances made in pursuance thereof, was insufficient to authorize the grantee to occupy and use the right of way for the purposes specified in the grant, it is strange that Congress, while granting, without charge, rights of way over lands which were exclusively public, did not also include lands similarly situated, in which the public had only a reversionary interest. From these considerations, the conclusion is unavoidable that, subject to the entryman's conveyance, the act of 1873, if it does not operate as a grant of the Government's interest, at least authorizes occupancy and use for the purposes specified in the conveyance, during the life of the entry. What rights the railroad company may have in case its grantor, an entryman, abandons his entry, need not at this time be determined; that may be a matter of future concern to the defendant, but it is of no present interest to the plaintiff. For if we adopt the view least favorable to it, and hold that it is not a grantee, but only a licensee, still as a licensee merely, the defendant's present occupancy and use are fully authorized by law, and the plaintiff's contention that it is a trespasser must therefore fail.

It is suggested that if this view prevails it will be entirely possible for an entryman to impair the security of the Government for the repayment to it of the cost of the irrigation works, by granting rights of way to such an extent that the land will be rendered valueless for agricultural purposes. But such a peril is more fanciful than real; the danger from a possible epidemic of competitive railroad building may, it is thought, be treated as a negligible consideration, and as for a road or two, as was said by the Supreme Court in *Railroad Company vs. Baldwin*, 103 U. S. 426, the "lands would not be less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby."

It is further suggested that in carrying to completion its projected irrigation system, the Government may in the future reasonably require rights of way for ditches, in addition to those now occupied by existing canals, and that these lands, being west of the one hundredth meridian, are subject to the reservation in the act of August 30, 1890, the material provision in which is hereinbefore set forth, requiring that there be expressed in patents for lands lying west of the one hundredth meridian a reservation of rights of way for ditches and canals "constructed by authority of the United States." But the rights of the United States by virtue of this provision are no greater before than after patent, and it may well be doubted whether the contention would be made that a railroad company holding a deed from the patentee, for a right of way across lands the patent to

which contains such a reservation, should, at the instance of the Government, and solely because of such reserved easement, be enjoined from using its right of way. Assuming the correctness of the construction heretofore placed upon the law by this court, in *Green vs. Willhite* (October 31, 1906), and by the Supreme Court of Idaho, in *Green vs. Willhite*, 14 Idaho, 238, it does not follow that because of the reservation in favor of the Government, the patentee and his grantee must refrain from occupying or using the land, pending the selection and location by the Government of needful rights of way. The reservation is sufficiently onerous if it be limited to the purposes for which it was intended, and those purposes require only that the absolute possession and dominion of the owner yield to the needs of the Government when and to the extent that they actually arise; there is no reason why in the meantime the land should lie idle or that either the entryman or his grantee should be prohibited from making any legitimate use thereof. It is, of course, assumed that the reservation loses none of its force by reason of a transfer by the entryman or patentee, and that being the case, is there any more reason for enjoining the defendant from laying its track across the land than for restraining the entryman from building his fences or planting his crops, or digging his ditches? In either case, unless some other statute intervenes, the superior rights of the Government by reason of the reservation, must, as the public needs arise, necessarily prevail; and the peril of occupancy for railroad purposes would therefore appear to be to

the defendant rather than to the plaintiff.

Passing to the second branch of the case, the crossing of the plaintiff's canals, it is found that the controversy involves not so much the general principles of law by which the rights and obligations of the parties are to be measured, as the practical application of these principles to the particular facts. The Government having rightfully located and constructed its canals, is, like any other proprietor, entitled to be protected against any unlawful interference with their maintenance and use; and this general right the defendant in terms concedes. Upon the other hand, it is taken for granted that the Secretary of the Interior, at whose instance presumably the suit was commenced, is actuated only by the motives of a fair-minded and prudent owner, and is seeking, not to obstruct the building of the railroad, but only to be protected against loss and peril by reason of its construction. In a large sense, the Secretary of the Interior, in building and operating these canals, acts as the trustee for the settlers, upon whom, primarily, rests the burden of their cost, and into whose hands their control will ultimately pass; and it will therefore be assumed that he desires to encourage and not to impede the execution of a work which, admittedly, is of general interest, and will be of general benefit to the entrymen, provided that and so long as the work is carried forward in such manner as not to injure or imperil the project and property which it is his specific duty to protect. These canals extend through the country at great length, and obviously intolerable inconvenience would be en-

tailed not only upon the entrymen whose lands are crossed, but upon the public at large, if bridges should be denied for the passage of ways either public or private. Such crossings, whether of wagon roads or of railroads, should, of course, be made without expense or loss to the owner of the canals, and in such manner as not to impair or imperil their efficiency, or increase the burden of their maintenance. The precautions for safety should doubtless be taken with a full appreciation of the irreparable loss which may ensue upon the occurrence of a break in the banks of a large canal, especially when such break happens during the height of the irrigating season; and in case of a railroad crossing there is the additional important consideration of the peril to life and property in case the roadbed should be washed out or weakened by the escaping waters.

If then such are the general principles by which the rights and obligations of the parties are to be measured, it would appear to be the duty of the Court at the present time not absolutely to prohibit the defendant from extending its railroad across the plaintiff's canals, but only to restrain it from making the crossings in such a manner as to infringe upon the plaintiff's rights by diminishing the capacity or impairing the safety of the canals, or unnecessarily increasing the burden of their maintenance; and that is the course which will be pursued. At the present time, however, the record does not furnish sufficient data to enable the Court intelligently to formulate an order properly specifying the manner of making the crossings, and upon the statement of counsel for

the railroad company in open court that no work will be done affecting the canals until further order, the hearing will be continued a reasonable length of time to enable the parties to reach an agreement, covering the conditions which should be imposed upon the defendant; failing in which a further hearing will be had for the purpose of enabling the Court intelligently to prescribe such conditions.

[Endorsed]: Filed February 11, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit for the District of Idaho, Central Division.

IN EQUITY—No. 71.

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY (a Corporation), and
UTAH CONSTRUCTION COMPANY (a Corporation),

Defendants.

Replication [Filed March 22, 1910.]

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefits and advantage of exception which may be had and taken to the manifold insufficiencies of the said answer of the defendants, Minidoka and Southwestern Railroad Company, a corporation and Utah Construction Company, a corporation, for replication

thereto says that it will aver, maintain, and prove its bill of complaint to be true, certain and sufficient in the law to be answered unto, and that said answer of said defendants is uncertain, untrue and insufficient to be replied unto by repliant without this; that any other matter or thing whatsoever in said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true, all which matters and things the repliant is and will be ready to aver, maintain and prove as this honorable Court shall direct and humbly prays as in and by its said bill it hath already prayed.

C. H. LINGENFELTER,
United States Attorney for the District of
Idaho, and Solicitor for Complainant.

[Endorsed]: Filed March 22, 1910, A. L. Richardson, Clerk.

*In the Circuit Court of the United States in and for
the District of Idaho, Central Division.*

UNITED STATES OF AMERICA,
Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and the UTAH
CONSTRUCTION COMPANY (a Corpora-
tion),

Defendants.

Decree.

This cause coming on regularly for hearing before the Court on the 18th day of June, 1910, Messrs. C. H. Lingenfelter, and B. E. Stoutemyer, appearing as counsel for the complainant, and D. Worth Clark appearing as counsel for the defendants, and the complainant and the defendants having agreed as to certain of the matters of fact in issue in this cause and having stipulated the same in open court and the same having been entered in the record and testimony having been received as to other issues of fact, and the law and the facts having been duly considered by the Court, now therefore, it is hereby ordered, adjudged and decreed;

1st. That the complainant's prayer for an injunction and restraining order against the defendants herein is denied except as to the crossings over the several canals and laterals constructed by the complainant which crossings are more particularly described below.

2nd. That the defendants and each of them, their agents, officers and assigns, are hereby perpetually enjoined, prohibited and restrained from constructing or building any railroad, or railroad grade, bridge, crossing or structure of any kind on, in, or across the complainant's several canals and laterals herein referred to, or the rights of way thereof, and from occupying the same or any portion thereof except in the following manner and on the following conditions:

That the defendant, Railroad Company, its successors and assigns, shall construct and maintain at its own expense and without expense or cost to the

complainant, or its successors or assigns, the following described structures across the canals and laterals herein mentioned, said structures to be built and maintained in a good and safe and workmanlike manner and in a manner not to interfere with the free flow of the water through complainant's canals and laterals or the free passage of complainant's ditch-riders, employees and agents, and necessary or proper teams, animals, tools and machinery up and down the banks of said canals and laterals for the purpose of operating, repairing and maintaining the same and distributing the water therefrom, and shall keep said structures free from weeds, float or other material that would tend to check the flow of the water in said canals or laterals or endanger the same:

Main Canal Crossings.

The three main canal crossings at Stations 866+43, 1050+05 and 1091+65 on the said Burley to Oakley Branch Railroad, shall be two span pile trestle bridges without more than one pile bent in the water section of the canals. The channel bents shall be parallel with the axis of the canals and shall be boxed in, with a point up stream, so as to allow free passage of weeds and drift. The bottoms of the stringers shall be at least 12 inches above the normal water surface in the canals, the other details of said bridges being more particularly shown on the drawings hereto attached and made a part of this decree.

Lateral Crossings.

1. The crossing of lateral H-26 at Station 1074+00 on the railroad shall be a concrete siphon at

least 4 feet wide and $3\frac{1}{2}$ feet high, inside dimensions, with water way at all points at least equal to 14 square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14916 which is hereto attached and made a part of this decree.

2. The crossing of Lateral J-30, at Station 868 on the said railroad shall be a concrete culvert, at least 4 feet 3 inches wide and 2 feet high, inside dimensions, with water way at least 2 square feet in area, the other details of said culvert being more particularly shown on Drawing No. 14920, which is hereto attached and made a part of this decree.

3. Lateral J-32. The crossing over lateral J-32 at Station 926+71 on said railroad shall be a concrete siphon 5 feet wide and 3 feet 6 inches high, inside dimensions, with water way at least $17\frac{1}{2}$ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14919, which is hereto attached and made a part of this decree.

4. Lateral J-32. The crossing over lateral J-32 at Station 1003+37 on said railroad shall be a concrete siphon 2 feet 6 inches wide and 2 feet 6 inches high, inside dimensions, with water way at least $6\frac{1}{4}$ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14918, which is hereto attached and made a part of this decree.

5. Lateral H-26A. The crossing over Lateral H-26A at Station 1055+50 on said railroad shall be concrete siphon 3 feet wide, and 2 feet 6 inches high, inside dimensions, with water way at least $7\frac{1}{2}$ square

feet in area, the other details of said siphon being more particularly shown on Drawing No. 14914, which is hereto attached and made a part of this decree.

6. Lateral J-32F. The crossing over lateral J-32F at Station 1012+04 on said railroad shall be a concrete siphon 3 feet wide, and 2 feet 6 inches high, inside dimensions, with water way at least $7\frac{1}{2}$ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14914, which is hereto attached and made a part of this decree.

7. Lateral H-26B. The crossing over lateral H-26B at Station 1069+67 on said railroad shall be a concrete culvert 4 feet 6 inches wide and 2 feet high, inside dimensions, with water way of at least $3\frac{3}{5}$ square feet in area, the other detail of said culvert being more particularly shown on Drawing No. 14917, which is hereto attached and made a part of this decree.

8. Lateral J-32E. The crossing over lateral J-32E at Station 983+00 on said railroad shall be a concrete siphon 2 feet 6 inches wide and 2 feet 6 inches high, inside dimensions, with water way of at least $6\frac{1}{4}$ square feet in area, the other details of said siphon being more particularly described on Drawing No. 14922, which is hereto attached and made a part of this decree.

9. Lateral J-32B. The crossing over Lateral J-32B at Station 954+17 on the said railroad shall be a concrete siphon 2 feet 6 inches wide and 2 feet 6 inches high, inside dimensions, with a water way

of at least $6\frac{1}{4}$ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14922, which is hereto attached and made a part of this decree.

10. Lateral J-32G. The crossing over Lateral J-32G at Station 1040+50 on said railroad shall be a concrete siphon 2 feet 6 inches wide and 2 feet 6 inches high, inside dimensions, with a water way of at least $6\frac{1}{4}$ square feet in area, the other details of said siphon being more particularly shown on Drawing No. 14922, which is hereto attached and made a part of this decree.

At all siphons trash-racks shall be provided and maintained by the railroad company at its own expense at both inlet and outlet ends.

If the railroad right of way is fenced, openings shall be left in such fences of sufficient size and suitably located at or near both banks of said main canals and on one side of each lateral, so that the men, teams, and equipment used in maintaining the system, and in repairing breaks and distributing water may readily pass up and down the canals and laterals; or, at its option, suitable gates shall be provided and maintained by the railroad company at such openings of a kind and kept in a condition so that the same can always be readily opened and shut, and it shall be the duty of the agents and employees of the complainant to keep said gates closed except at such time as they are actually using the same.

At each canal and lateral, and in line with the openings in the fence or with the gates to be provided as above specified, the defendant railroad company

shall construct and provide suitable road crossings across its right of way and up to and across its railroad track, so that the complainant's ditch riders and agents, teams and outfits can readily pass over the same without delay.

Changes in the plans and specifications set out herein may be made by the mutual consent of both parties, provided that such consent with a description of the proposed change be in writing, signed by both said railroad company and the representatives of the complainant and filed with the court; and so far as it relates to bridges, ditch crossings, fences, gates, and road crossings this decree is subject to modification upon the application of either party, upon due notice and further hearing.

Dated this 15th day of July, 1910.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed July 15, 1910. A. L. Richardson, Clerk.

[Testimony, etc.]

*In the Circuit Court of the United States in and for
the District of Idaho, Central Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),

Defendants.

C. H. LINGENFELTER, Esq., and

B. E. STOUTEMYER, Esq.,

Counsel for Complainant.

D. WORTH CLARK, Esq.,

Counsel for Defendants.

June 18, 1910.

Before Honorable FRANK S. DIETRICH, United
States District Judge for the District of Idaho.

[Proceedings Had June 18, 1910.]

Mr. LINGENFELTER.—I have prepared a stipulation for the taking of the testimony, which is as follows:

[Stipulations Re Testimony, Facts, etc.]

It is hereby stipulated that in this cause oral testimony of witnesses may be dispensed with, and that the plaintiff and the defendant respectively may make an offer of the facts upon which they rely, and that such may be considered by the Court as the evidence adduced at the hearing, subject to legal objections as to relevancy and materiality, such objections to be made at the time of such offer.

Mr. CLARK.—I would like to have inserted there that they make this offer and it shall become the evidence so far as agreed to and noted in the record, that is, in other words, when an offer is made by Mr. Lingenfelter to prove a certain thing, if I agree that the offer properly states the facts in the case then it may be considered to be the evidence.

Mr. LINGENFELTER.—Certainly.

The COURT.—That will be understood, gentlemen. You may proceed and if you can't agree on the facts you may prove them.

Mr. CLARK.—I presume that that will not bar either of us from putting in any exhibits that are proper.

The COURT.—No.

Mr. LINGENFELTER.—That the defendant Minidoka & Southwestern Railroad Company is a corporation. I believe that is admitted, isn't it Mr. Clark?

Mr. CLARK.—Yes. It is not formerly admitted, but it isn't denied; I think perhaps it is not formerly admitted, but it isn't denied.

Mr. LINGENFELTER.—That the defendant Minidoka & Southwestern Railroad Company is a railroad corporation, organized and existing under the laws of the State of Idaho; and the defendant Utah Construction Company is a corporation created and existing under the laws of the State of Utah, and entitled to do business in the State of Idaho, and is doing business in said State as a contractor and engaged under contract in constructing the line of railway of said defendant railroad company between Burley Station and the town of Oakley, Cassia County, in said State, and its only connection with the matter involved in this suit is in pursuance of such contract.

Mr. CLARK.—That is agreed to.

Mr. LINGENFELTER.—Second. That the complainant, the United States of America, operating under the provisions of the act of Congress of June 17, 1902 (32 Stat. L. 388), has constructed and is now operating a certain irrigation project, in the State of Idaho, in the counties of Lincoln and Cassia,

consisting of a diversion dam across Snake River, a reservoir on Snake River, and numerous canals, laterals, irrigation ditches and drainage ditches; also an electrical power plant and transmission line, by means of which water is pumped for the irrigation of the lands lying above the gravity canals, all of which said canals, laterals, ditches, transmission lines and irrigation works, including the various canals and laterals hereinafter referred to as being crossed or about to be by the defendant railroad company have been constructed under the authority of the United States, under the provisions of the act of Congress of June 17, 1902, 32 Stat. L. 388.

The COURT.—Hereinafter referred to?

Mr. LINGENFELTER.—That is, by the maps attached to the answer, I think.

The COURT.—Yes, but you are making a stipulation now of the facts.

Mr. LINGENFELTER.—The matters referred to are as follows: That the mains of the Government canals and laterals to be crossed by the proposed Burley to Oakley branch of the defendant's railroad are as follows, and were constructed on the dates written after each. Canals and laterals crossed by the Burley-Oakley railroad:

C Canal (1st lift) Built March and April, 1908.

H Canal (2nd lift) Built April and May, 1908.

J Canal (3rd lift) Built May and June, 1908.

H 26 lateral, Built June, 1909.

H 26B lateral, Built June, 1909.

J 32 G Built September and October,
1909.

J 32 F Built September, October and
November, 1909.

J 32 Sta. 168 Built September and October,
1909.

J 32 E lateral, Built May, 1909.

J 32 B lateral, Built June, 1909.

J 32 Sta. 68, Built May, 1909.

J 32 Built October, 1909.

Mr. CLARK.—Is that all that you care to dictate as to this particular stipulation?

Mr. LINGENFELTER.—On this point, yes.

Mr. CLARK.—I think it would be proper to add to that stipulation, in order that there may be no misunderstanding, that no formal withdrawal was made of a right of way for these canals by the Secretary of the Interior.

Mr. LINGENFELTER.—Except as provided for by the act.

Mr. CLARK.—Well, except as provided by general statute. No formal withdrawal was made under the first subdivision provided for in the withdrawal under the Reclamation Act.

The COURT.—Gentlemen, is all of this colloquy to go into the record?

Mr. LINGENFELTER.—No, your Honor.

The COURT.—How is the reporter to know what is to go in and what is not to go in? It seems to me that this is going to be a very unsatisfactory way to make up this record. It will be very difficult for the Court to determine; it will have to pick a grain of wheat out of a stack of straw, apparently.

Mr. CLARK.—Perhaps the best thing would be

for Mr. Lingenfelter and I to try to prepare a stipulation covering these formal matters.

Mr. LINGENFELTER.—Can't we go ahead, Mr. Clark, with what we have here? It is undisputed, I presume.

Mr. CLARK.—Yes.

Mr. LINGENFELTER.—And supply what is in dispute if we can later.

Mr. CLARK.—I can make up my part of this record in a very few minutes.

Mr. LINGENFELTER. — Third. — Under the canals and irrigation system of the complainant, as at present constructed, there is about 130,000 acres of irrigable land.

Fourth.—That all the lands under said Minidoka Project and the extension thereof are arid in character, and require irrigation to produce agricultural crops thereon, but are productive when irrigated.

Fifth.—That the said Government ditches, canals, and irrigation works, and the proposed extensions thereof are the only means for the irrigation of said lands.

Sixth.—That the lands, ditches and canals which are being crossed and which are to be crossed, and which are about to be crossed by the defendant's said railroad line from Burley to Oakley are a part of that section of said Minidoka Project which is known as the South Side Minidoka Pumping Project.

Seventh.—That said South Side Minidoka Pumping Project is under construction and partly in operation, but additional canals, ditches, enlargements, alterations and extensions thereof are necessary for

the irrigation of parts of said project.

Eighth.—That on November 17, 1902, the Secretary of the Interior, by his order dated November 17th, 1902, under the authority of section 3 of the Act of June 17, 1902 (32 Stat. L., 388), withdrew from entry, except under the homestead law, certain lands believed to be susceptible of irrigation from said works, and ordered that all lands entered and entries made under the homestead law within the areas so withdrawn should be subject to all the provisions, limitations, charges, terms and conditions of said act of Congress of June 17, 1902, known as the Reclamation Act. Among other lands, the Secretary withdrew, under said withdrawal and order, the following described lands:

The Southwest quarter of the Southeast quarter of Section 19, Township 10 South, Range 23 East, Boise Meridian.

All of Section 30, Township 10 South, Range 23 East, Boise Meridian.

And the Southeast quarter of the Southeast quarter of Section 25, Township 10 South, Range 22 East, Boise Meridian.

And all of Sections 1, 11, 12 and 14, in Township 11 South, Range 22 East, Boise Meridian.

Ninth.—That all of said above-described lands were, at the date of said withdrawal, unentered, unoccupied public lands of the United States.

Tenth.—That said order of withdrawal has not been rescinded, nor have said lands been restored nor freed from the conditions or restrictions of the Reclamation Act.

Eleventh.—That the lands in Section 36, Township 10 South, Range 22 East, Boise Meridian, are school lands, granted by the United States to the State of Idaho, and those portions of said Section 36 crossed by said railroad line have heretofore, since 1905, been sold by the State to private parties.

Twelfth.—That the other lands crossed by the said defendant's said railroad line in Sections 19 and 20, of Township 10 South, Range 23 East, Boise Meridian, except the Southwest quarter of the Southeast quarter of Section 19, Township 10 South, Range 23 East, are patented lands, for which patent was issued under the Desert Land Law prior to said order of withdrawal, and which the complainant does not claim to control.

Thirteenth.—That after the withdrawal of said above described lands, as above set out, the said lands so withdrawn and restricted were entered by various persons under the homestead laws, subject to all the provisions, limitations, charges, terms and conditions of said Reclamation Act above referred to, but said entrymen have not yet made final proof or received patent or final certificate, neither have they yet repaid the United States any part or installment of the cost of construction of said project.

Mr. CLARK.—I don't know whether that is true or not. Is that true, that they haven't paid anything?

Mr. STOUTEMYER.—I have certified copies from the land office to show that.

The COURT.—It was claimed at the time of the hearing that some of these men were just about

ready to make final proof.

Mr. STOUTEMYER.—They can't make final proof, under the Reclamation Act, until they have paid all of the charges.

The COURT.—Is it true that none of these entrymen have paid any charges?

Mr. STOUTEMYER.—It is true, yes, sir.

The COURT.—Is it also true, Mr. Stoutemyer, that none of them have made what is called the five-year proof, final proof?

Mr. STOUTEMYER.—There is a difference between five-year proof and final proof?

The COURT.—The reason I ask is, that this stipulation might be subject to misconstruction.

Mr. STOUTEMYER.—Final proof cannot be made until all the payments have been made.

Mr. LINGENFELTER.—Fourteenth.—That the lands shown upon the map attached to the defendant's answer herein as homestead entries are homestead entries made and held subject to the conditions, terms and charges and restrictions of the Reclamation Act.

Fifteenth.—That after the withdrawal of the above-described lands, as above set out, and the entry thereof by the several entrymen, the defendant railroad company went upon said lands and made surveys for a railroad line across the same from said Town of Burley to said Town of Oakley, both in Cassia County, Idaho, and has let contracts for the construction thereof, and that said railroad company and its said contractor, the Utah Construction Company, have gone upon said lands and

partly constructed said railroad grade and railroad line, and is threatening to continue the same to completion, and will continue the same to completion unless restrained by the order of this Court.

Sixteenth.—That said railroad construction and threatened construction follows approximately the lines shown on the map attached to the defendant's answer herein.

Seventeenth.—That said railroad construction and threatened construction consists of a railroad embankment upon which railroad ties and rails are to be laid, the borrow pits from which the earth is removed to form such embankment, and the grades, cuts and fills which are usual in railroad construction, and also several bridges across the several Government canals and laterals of the South Side Minidoka Pumping Project.

Eighteenth.—That said railroad line crosses three of the main canals of said South Side Minidoka Pumping Project, known as the first lift canal, the second lift canal, and the third lift canal, as well as various laterals and smaller ditches.

Nineteenth.—That under the provisions of said Reclamation Act of June 17, 1902, the complainant has expended in excess of \$1,300,000.00 in the construction of the irrigation works for the irrigation of the lands lying under said South Side Minidoka Pumping Project, a portion of which is the land above described, which is now being taken possession of, excavated and thrown up into a railroad grade by said defendant railroad company.

Mr. CLARK.—Of course, if the Court holds that

the matters covered by this part of the stipulation are proper to introduce evidence on in this case, then I think that stipulation probably states the fact. However, I object to it for the reason that it is immaterial and incompetent in this case.

The COURT.—Well, perhaps it had better go in.

Mr. LINGENFELTER.—Twenty.—That no portion or installment of the cost of construction of said project has been returned or paid to the United States.

Twenty-one.—That the said lands now being occupied and excavated by said railroad company as a railroad grade are in their natural condition well-suited for irrigation and cultivation.

Twenty-two.—That by said excavation and the construction of said railroad grades, and the digging out of said borrow pits said lands now being occupied and graded into a railroad grade are rendered unsuitable and worthless for irrigation and agricultural purposes.

Twenty-three.—That it is not practical to use for agricultural and irrigation purposes the lands so occupied by said railroad company during its said occupation and use thereof for railroad purposes, and that said lands could not be restored to a suitable condition for agricultural and irrigation purposes without considerable expense in leveling down said railroad embankment and filling said borrow pits, which expense in many cases would be greater than the value of the land in question.

Twenty-four.—That said defendant railroad company has surveyed its said railroad line on and

across three irrigation canals constructed under the authority of the United States, under the provisions of the Reclamation Act of June 17, 1902, and that said defendant railroad company is threatening to and is about to go upon and across said irrigation canals and to construct its railroad line and bridges upon and across the same, as well as across several intervening Government laterals and smaller ditches.

Mr. CLARK.—I would like to have it show that we are crossing these upon the right of way as shown by our map attached to the answer.

Mr. LINGENFELTER.—But upon the right of way shown by the map attached to the answer in this case.

The COURT.—The laterals and ditches referred to being the same as hereinbefore specifically referred to.

Twenty-five.—(Mr. LINGENFELTER.) That said proposed railroad line will cross said Government's first lift canal at approximately the point shown on the map attached to the defendant's answer herein, in Lot 3, of Section 30, Township 10 South, Range 23 East, Boise Meridian.

Twenty-six.—That said proposed railroad line will cross said Government's second lift canal at approximately the point shown on the map attached to the defendant's answer herein, in the Southeast quarter of the Northeast quarter of Section 36, Township 10 South, Range 22 East, Boise Meridian.

Twenty-seven.—That said proposed railroad line will cross said Government's third lift canal at ap-

proximately the point shown on the map attached to the defendant's answer herein, in the Northwest quarter of the Southeast quarter of Section 14, Township 11 South, Range 22 East, Boise Meridian.

Twenty-eight.—That the reclamation homestead entries referred to above were made on the dates shown on the map attached to the defendant's answer herein.

Mr. CLARK.—That is a matter I prefer to put in as a part of my case.

Mr. LINGENFELTER.—We will want you to show that; we don't object to who shows it in the record.

That the reclamation homestead entries referred to above were made on the dates shown on the map attached to the defendant's answer herein. That is your own showing.

Mr. CLARK.—That is the fact.

Mr. LINGENFELTER.—Twenty-nine.—That the three main canals were constructed and operated by the Government prior to the survey for the construction of the railroad.

Mr. CLARK.—I guess that is true. I think they were constructed, and I presume they were operated.

Mr. STOUTEMYER.—I understand it is the intention of the company to build fences around—?

Mr. CLARK.—I suppose so, but I don't recognize your right to ask any such question of me in this case.

Mr. LINGENFELTER.—If the Court please, another phase of this case has come up, and that is

this: The railroad company were given license to construct fences upon its right of way, and the question of maintaining gates to be placed in proper and convenient places should be taken into consideration in this case, it seems to me.

Mr. CLARK.—I presume that is a matter of law. Under the issues in this case, if such an order is proper, I suppose it can be made. I think there won't be any disposition on our part to refuse access.

The COURT.—My impression was, when this matter was on preliminary hearing, that at these points where the canals of the Government were crossed there should be put in and maintained by the railroad company passages for the reasonable accommodation of those who had charge of the canals.

Mr. CLARK.—Yes, I think that is true, your Honor, and we are still willing to do it. As a matter of fact, the engineer in charge tells me he is making arrangements.

Mr. LINGENFELTER.—May it be understood that that part of it may go in the decree?

The COURT.—The record should throw some light upon that just as it does upon the matter of constructing the bridges.

Mr. LINGENFELTER.—I am informed by one of the engineers, Mr. Paul, that they have agreed upon that, upon the place where the gates should be placed and their maintenance. If that is true, that might go into the record.

Mr. CLARK.—I understand that is correct, that

they have agreed as to these matters.

The COURT.—Suppose you agree upon that if you can and put it in in connection with the bridge crossings; it would come in near the same place.

Mr. STOUTEMYER.—That the railroad company is about to and will fence its proposed railroad on both sides down to the water's edge of the Government canals, and that it is necessary for the ditch riders and ditch tenders of the Government canal to pass up and down the bank of the canal at frequent intervals, and that in times of threatened break *of* leak in the canal it would be disastrous to the Government property if they were delayed or hindered in making such crossings and going up and down the banks of the canal to make necessary repairs and to distribute the water.

Is there any objection to that?

Mr. CLARK.—No, I think not.

Mr. STOUTEMYER.—As to the plats of the works, I suppose you will offer that as a part of your—

Mr. CLARK.—Yes; it is really a part of your case, I suppose, still I can offer it.

The COURT.—Those are in such condition that a decree may be formulated upon them?

Mr. STOUTEMYER.—Yes.

The Government maintains that the railroad company has no right to go on or across those canals, or to construct crossings at any points referred to in the complaint. But if it is held by the Court that the company has that right, crossings constructed according to the plans submitted to the Court,

marked Plaintiff's Exhibit "A," as the same were drawn by the railroad company, with the modifications set out in the two copies of letters attached thereto, signed project engineer, and marked Plaintiff's Exhibit "B," will be as satisfactory as any form of bridge.

Mr. CLARK.—I would like to have it in the record that it is also satisfactory to the railroad company.

Mr. LINGENFELTER.—It being further understood that the Government waives no legal rights by the agreement made by the engineers and reduced in the exhibits. In other words, we don't consider that we waive anything by the engineers entering into an agreement as to the character of bridges to be constructed.

Mr. CLARK.—We agree that that character of construction is all right.

Mr. LINGENFELTER.—We don't want to waive the legal right that they can—

The COURT.—I desire to ask counsel for the Government if you agree that the bridge constructed and maintained as called for by these exhibits does not interfere with the flow of the water or imperil the safety of the canal.

Mr. LINGENFELTER.—I understand, your Honor, from Mr. Paul, that the engineers have agreed upon the form of bridge, and in the present form, as agreed upon, it would not interfere with the free flow of the water, and is satisfactory in the present form as agreed upon.

The COURT.—The form of the stipulation as put

by Mr. Stoutemyer is not very satisfactory to the Court. The Court is inclined to require a bridge that will not interfere with the flow of the water and will not endanger the canal. If this bridge is of that form the Government can say so.

Mr. LINGENFELTER.—If the Court holds that they have a right to construct such a bridge, the present form as agreed upon is satisfactory to the Government.

The COURT.—I don't care whether it is satisfactory to the Government or not; I want a bridge that is satisfactory to the Court.

Mr. LINGENFELTER.—The engineers say it is satisfactory.

The COURT.—You may answer the question, whether or not it will interfere with the flow of the water or whether it will endanger the safety of the canal.

Mr. LINGENFELTER.—It will not, as agreed upon, if properly maintained.

That, if the Court please, covers all the offers made by the Government except the question of future canals, and I suggest that we adjourn until two o'clock and get our testimony in proper shape.

The COURT.—Very well.

At this time an adjournment was taken until 2 o'clock.

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At 2 o'clock the hearing was resumed, and the following proceedings were had, to wit:

[Testimony of Charles H. Paul, for Government.]

CHARLES H. PAUL, a witness called on behalf of the Government, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. LINGENFELTER.)

Q. State your name.

A. Charles H. Paul.

Q. State your occupation.

A. Civil engineer.

Q. In whose service are you now employed?

A. The United States Reclamation Service.

Q. How long have you been acting for the Reclamation Service? A. About five years.

Q. What projects have you had charge of?

A. The Lower Yellowstone Project in Montana, and the Minidoka Project in Idaho.

Q. How long have you been working on the Minidoka Project?

A. For about eight or nine months.

Q. Have you been there continuously since the canals and laterals were constructed?

A. Since construction started?

Q. Yes.

A. No; since last October I have been there.

Q. What canals, or how many canals and laterals have been constructed under the Minidoka Project?

A. I can't give the number without referring to

(Testimony of Charles H. Paul.)

our records. There are several hundred miles of canals and laterals.

Q. How many main canals?

A. There are three main canals on the South Side Project, that is, the lands in question.

Q. How many acres, approximately, can be irrigated under the present system, in addition to the lands now provided for, by extension of the present pumping system? A. About 8000 acres.

Q. Assuming that 8000 acres can be irrigated in addition to what is now provided for, how many main canals and approximately how many laterals would be required?

Mr. CLARK.—That is objected to as incompetent and immaterial, and not within the issues in this case, in so far as it is an attempt to show that additional canals outside of those now laid out and constructed will be required.

The COURT.—The objection is sustained. He may answer, however, so that the record may be made up.

A. There would at least be one main canal required, and possible half a dozen laterals.

Mr. LINGENFELTER.—Q. What would be the approximate cost of construction, what would be the difference of the cost of constructing a canal such as would be required to irrigate the lands stated, before any railroad construction was done, and what would be the cost after the construction was done?

Mr. CLARK.—I object to that as incompetent and

(Testimony of Charles H. Paul.)

immaterial, and not within the issues involved in this case.

The COURT.—I hardly see how the witness could answer that intelligently, unless he knows what you want.

Mr. LINGENFELTER.—Q. Are you able to state, Mr. Paul, what would be the difference in the cost of the construction of a canal, I mean across the present roadbed, before the railroad construction and at the present time, assuming that there was no railroad bed there?

The COURT.—Well, obviously, Mr. Lingenfelter, that would depend upon the size of the canal and the place where—

Mr. LINGENFELTER.—Q. What is the general topography of that country where this land is to be irrigated?

A. It is generally an even slope.

Q. Level country, is it?

A. It is a gradual slope.

Q. Well, would there be any difference in the cost of construction on certain parts of the land and other parts? A. Yes.

Q. Explain what that difference would be now.

A. Well, it would all depend on the location, the elevation of the railroad, with reference to the elevation of the water in the canal, as to what the cost of the crossing would be.

Q. Well, would it cost any more to construct a canal where the ground is uneven than where it is even?

(Testimony of Charles H. Paul.)

A. Well, it might and it might not; probably would.

Q. What would be the size or dimensions of the canal such as would be required for the irrigating of the 8000 acres of land as testified?

A. It would be about four feet wide on the bottom and four to five feet deep.

Q. What would be the width?

A. About four feet wide on the bottom, with one and a half to one side slopes.

Q. Can you approximate the cost of construction before the railroad is built of such a canal?

A. Yes, sir.

Q. State what that would be.

Mr. CLARK.—That is objected to as incompetent and immaterial, and not within the issues in this case in any way.

The COURT.—Sustained. You will understand, gentlemen, that I am ruling upon these questions as a Master would.

Mr. LINGENFELTER.—I understand, your Honor. The plaintiff offers to show what the cost—

The COURT.—You may proceed. He may answer.

A. It would cost approximately \$20.00 for the construction of a hundred feet of canal.

Mr. LINGENFELTER.—Q. Before any railroad was built?

A. Under the conditions as they are before the railroad is built.

Q. What would be the approximate cost of the

(Testimony of Charles H. Paul.)

construction of such a canal after the railroad is built or constructed?

Mr. CLARK.—Objected to as incompetent and immaterial, and not within the issues.

The COURT.—Sustained. I really can't see how the witness can intelligently answer the question. If he thinks he can, he may answer it.

Mr. LINGENFELTER.—Go ahead.

A. My estimate would be that it would cost somewhere between \$500.00 and \$1500.00.

Q. You mean to say it would cost all the way from \$500.00 to \$1500.00 more after the railroad is built than it would be before there was any railroad construction to put through such a canal?

A. Yes, sir.

Q. What would be the elements of additional cost?

A. Before the railroad was there no structure would be necessary; after the railroad was built a structure would be indispensable, a structure of some sort.

Q. Now, you say it would cost from \$500.00 to \$1500.00 difference? What do you mean by that? Why do you give that range?

A. Well, if it would be possible to put in a bridge to carry the railroad across the canal with a bridge, it might be done for \$500.00, but if the railroad is so located with reference to the water surface in the canal that a bridge would not be possible, that is, if the water surface in the canal was higher or nearly as high as the tracks it would be necessary to drop down

(Testimony of Charles H. Paul.)

under the railroad and come up on the other side; that would necessitate a structure which we call an inverted siphon, and the construction of that would run in the neighborhood of \$1500.00.

Q. In estimating the cost of the bridge are you taking into consideration such a bridge as is being placed over the canals already in operation?

A. I am giving a very rough estimate of the cost of a bridge such as is proposed to put over the present canal.

Q. What requirements have been made by the railroad company, if any, in making crossings for laterals under lands withdrawn where the railroad has already constructed its roadbed, and there no provision has been made for the construction of such canals or laterals?

Mr. CLARK.—That is objected to as incompetent and immaterial.

The COURT.—Sustained. He need not answer that.

Mr. LINGENFELTER.—If the Court please, this morning it was suggested by the Court that the bridges as agreed upon by the engineers would be satisfactory or would be sufficient, in other words, to cause the water to have a free flow, without any obstruction or danger to the bridge. Now the present form as agreed upon will be satisfactory if it is properly maintained, that is to say, if the weeds are kept away from the abutments on the bridge, if there is proper maintenance of the bridges under the present form as agreed upon they will be satisfactory; oth

(Testimony of Charles H. Paul.)

wise they would clog the abutment and cause some danger to the bridge and stop the flow of the water.

Mr. CLARK.—We are now and have been at all times willing in this case—

The COURT.—I don't see that there is anything before the Court at this time.

Mr. LINGENFELTER.—I was going to say that if that was agreed upon, that these bridges would be properly maintained, it wouldn't be necessary to go into this class of testimony.

Mr. CLARK.—We recognize the fact that we must maintain these bridges.

Mr. LINGENFELTER.—That's all.

Mr. CLARK.—That's all.

Mr. LINGENFELTER.—That is all, your Honor.

The COURT.—Q. Where is this 8,000 acres of land, Mr. Paul?

A. It is just south and adjoining the present project.

Q. This railroad line will lie between the head works of your system and this land?

A. It cuts across the land.

Q. It cuts across the land?

A. Across the land.

Q. How much of it lies below the railroad right of way?

A. Well, I can't say, but several—but a considerable portion of it, several hundred acres at least, maybe two or three thousand,—I can't say without consulting the records.

Of course you wouldn't need to cross the rail-

(Testimony of Charles H. Paul.)

road right of way for the purpose of irrigating that which lies above it?

A. No; simply for that below; there is some *of below* the railroad.

Q. Have you actually projected a canal for the irrigation of the lands lying below?

A. The irrigation of this land has been considered, yes, sir, and canals have been projected, yes.

Q. Are you now in the act of constructing them?

A. No.

Q. Has any appropriation been made for their construction?

A. No; the construction has not yet been authorized.

Q. Then, as a matter of fact, there isn't any definite decision to irrigate these lands? A. No.

Q. It is merely a possibility?

A. Yes.

Mr. CLARK.—No questions.

Mr. LINGENFELTER.—That's all.

[Proceedings Re Certain Paragraphs of Answer, etc.]

Mr. CLARK.—It is agreed by and between the counsel for the respective parties in this action that the allegations contained in paragraphs numbered 1, 2, 3, and 4, as found on pages 8 and 9 of the answer in this case, are true and correct, and the facts therein stated are agreed to be the facts, for the purpose of this case.

The COURT.—Are those paragraphs numbered?

Mr. CLARK.—Yes.

Mr. LINGENFELTER.—What numbers did you say, Mr. Clark?

Mr. CLARK.—Number 1, 2, 3 and 4. Those are the formal allegations of our incorporation and our right to do business, and our compliance with the constitution and laws of the State of Idaho.

Mr. LINGENFELTER.—The Government does not resist the statement as to the truth of the facts set forth in paragraph 4, but objects to the matters therein contained as incompetent and immaterial for any purpose in this case.

The COURT.—Incompetent or irrelevant?

Mr. LINGENFELTER.—Irrelevant.

The COURT.—What is 4? Let me see it.

Mr. CLARK.—I will pass it back to your Honor.

The COURT.—Overruled.

Mr. CLARK.—It is agreed that none of the lands included within the boundary lines of the reclamation project in question where the right of way in question passes over the same have been withdrawn under the first class of reservation contained in the Reclamation Act, and that at such places as the word withdrawal is referred to in these stipulations is meant such withdrawal as is provided for in said Reclamation Act under the second class, that is, a withdrawal from all forms of entry except under the Homestead Act, subject to the restrictions imposed by the Reclamation Act governing such homestead entries.

I now offer in evidence Defendant's Exhibit No. 1, it being exemplifications or certified copies of papers filed in the office of the Secretary of the Interior by the Minidoka & Southwestern Railroad Company,

showing compliance with the act of March 3, 1875, for the purpose of obtaining the benefit from that act over the lands in question for the purpose of a right of way. They show a letter signed, as I recollect it now, by the Acting Secretary, Pierce, to the effect that they are in due form, and, as I understand, recommending them for approval. The position that we would take in that matter is that this certificate that they are in due form and in full compliance with the act would compel their approval by the Secretary of the Interior, that the law would give him no discretion, if they are in compliance.

Mr. LINGENFELTER.—The plaintiff objects to the introduction of Defendant's Exhibit 1, for the reason that no plan or profile of the route has been filed with the Secretary of the Interior, and for the further reason that the Secretary of the Interior has not approved the exhibits.

Mr. CLARK.—The last amendment, if the Court please, in so far as it has been passed upon by the Secretary of the Interior, is shown there.

The COURT.—These don't purport to show the profile?

Mr. CLARK.—No.

The COURT.—The objection is overruled.

Mr. LINGENFELTER.—Note an exception.

Mr. CLARK.—I should like to call Mr. Robinson for a question.

[Testimony of Robert B. Robinson, for Defendants.]

ROBERT B. ROBINSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. You may state your name, residence and occupation.

A. Robert B. Robinson, residence, Salt Lake, occupation civil engineer.

Q. Are you in the employ of the defendant company? A. Yes, sir.

Q. What, if anything, do you have to do with the buildings of the road in question from Burley to Oakley?

A. I have local charge of the construction.

Q. Do you know where the right of way is over the lands in question here? A. Yes, sir.

Q. When was construction work commenced over the lands in question?

A. Very shortly after the 1st of November, 1909.

Q. Up to the time this suit was brought what, if anything, has been done towards locating on the ground the right of way over the land in question?

A. Well, the center line of the track had been staked out, and part of the cross sections for the grading.

Mr. LINGENFELTER.—Wait a minute, Mr. Robinson. What was your question, Mr. Clark, there again?

(The stenographer thereupon read the last ques-

(Testimony of Robert B. Robinson.)

tion and the answer thereto.)

Mr. CLARK.—Q. Approximately what part of the grading had been done for the road?

A. Well, I can't recall that from memory.

Q. Can you recall approximately how much?

A. I shouldn't like to attempt it.

Q. Well, can you say whether it was any considerable portion or not?

A. Yes, sir, grading had been under way.

Q. Was this permanent or temporary construction of the road? A. Permanent.

Mr. CLARK.—I think that is all.

Cross-examination.

(By Mr. LINGENFELTER.)

Q. When did you say this construction was made, in what year? A. It started in 1909.

Q. 1909? A. Yes, sir.

Q. Then at the time this land was withdrawn under the Reclamation Act proper there hadn't been any work done, had there?

A. I know nothing about it.

Q. Well, say it was withdrawn in 1903, there hadn't been any work done at that time?

A. No, sir.

Q. What work had been done, did you say, before the commencement of this suit?

A. Grading work.

Q. How much grading had been done?

A. I can't recall the *proportion the* different miles. I gave it once from actual records.

Q. Can you recall any permanent construction

(Testimony of Robert B. Robinson.)

work? A. Yes, sir.

Q. Before this suit was commenced?

A. Yes, sir.

Q. What did it consist of? A. Grading.

Q. How much grading?

A. As I have already stated, I can't remember, and wouldn't attempt to.

Q. Can't you approximate it?

A. No, sir.

Q. All you know is that some grading was done before this suit was commenced? A. Yes, sir.

Q. You can't tell how much?

A. I don't remember.

Q. The line of the road was staked out, was it?

A. Yes, sir.

Redirect Examination.

(By Mr. CLARK.)

Q. Since this suit was commenced has there been any change in the location of the road?

A. No, sir.

Q. Over the land in question? A. No, sir.

Q. What is the present condition of the grade over the land in question?

A. The grading is completed.

Mr. CLARK.—That's all.

Recross-examination.

(By Mr. LINGENFELTER.)

Q. Can you give the date of the first work that was done on this road between these points?

The COURT.—What kind of work? Surveying or actual grading?

(Testimony of Robert B. Robinson.)

Mr. LINGENFELTER.—Construction work.

Q. Can you give the date of the first construction work that was done on this road?

A. No, sir, not from memory. It is a matter of record. I can give you the record.

Q. Can you approximate it?

Mr. CLARK.—I will show you this affidavit; perhaps you may be able to refresh your recollection (showing witness document).

A. My recollection is that it was about the 11th of November.

Mr. LINGENFELTER.—Q. Of last year?

A. 1909, yes, sir.

Q. Prior to that time the road hadn't been mapped out, no stakes had been driven and no grading had been done?

A. The road had been staked out long before that.

Q. How long before that?

A. My recollection is that it was in June and July, 1909.

Q. 1909? A. Yes, sir.

Mr. LINGENFELTER.—That's all.

Mr. CLARK.—That is all, Mr. Robinson.

[Proceedings Re Certain Homestead Entries, etc.]

Mr. CLARK.—It is agreed by and between counsel for the respective parties that Lorenzo W. Robins made homestead entry No. 2550 on May 19, 1904.

Mr. LINGENFELTER.—Can't you abbreviate it by showing that the entrymen have granted the right of way so far as in their power lies across certain sections?

Mr. CLARK.—I think I can abbreviate it by simply putting this map in, if you will agree that it is correct.

(Whereupon the map was marked by the stenographer as Defendant's Exhibit No. 2.)

It is stipulated and agreed that the various parties shown on Defendant's Exhibit No. 2, as having made homestead entries upon land over which the right of way in question passes, in so far as it is contained within the boundary lines of this reclamation project, made such homestead entries at the various times stated on Defendant's Exhibit No. 2, subject to the charges, terms and restrictions of the Reclamation Act, and have, since the time of their various entries, been in possession of said lands, and said entries are still intact. Is that agreed to?

Mr. LINGENFELTER.—With the exception of the possession of the canals and laterals. Of course they wouldn't be in their possession.

Mr. CLARK.—Except such possession as the Government has of canals and laterals owned by the Government, crossing said tracts of land; such possession and right of the Government, however, does not depend upon any reservation or withdrawal made under the first form of withdrawal of the Reclamation Act.

It is further agreed that each and all of the parties shown to have made homestead entry upon the lands in question on Defendant's Exhibit No. 2, down to the center line of Section 14, Township 11 South, Range 23 East, Boise Meridian, have conveyed to the defendant company, Minidoka & Southwestern Railroad Company, by good and sufficient deeds, such

right as they were able to convey for a right of way over the land in question, such right of way so conveyed being the right of way upon which the defendant company is, and was at the time of the commencement of this suit, constructing its railroad. Is that all right?

Mr. STOUTEMYER.—Of course, we don't know that, but if you assure us that they have, we will take your word for it.

Mr. CLARK.—I have the deeds here.

Mr. STOUTEMYER.—Yes, we will agree to that.

Mr. CLARK.—That Section 36, Township 10 south, Range 23 East, Boise Meridian, is a school section, and where the right of way of the defendant company crosses said section within the boundary lines of this reclamation project the State of Idaho has contracted to convey said land to various parties.

Mr. STOUTEMYER.—At that point I would like to have you set out that they contracted to convey it after 1905. The materiality of that is that in the year 1905 the State granted the—the reason is that in 1905 the State, or the legislature, granted rights of way for canals across the lands in question.

Mr. CLARK.—Well, it may show that.

Said various parties to whom the State of Idaho has conveyed and contracted to convey said land situated in Section 36, over which said right of way passes, have conveyed to the defendant, the Minidoka & Southwestern Railroad Company, a right of way over said land, and it is upon said right of way so conveyed that said defendant company was at the time of the commencement of this suit and is now con-

structing said railroad.

That all of the land over which said railroad is constructed, situated within the boundary lines of this reclamation project, is either patented land, land formerly school land, but which has been contracted by the State to be conveyed or conveyed to private parties in possession of the same, or lands upon which parties have filed homestead entries under the provisions of the Reclamation Act, said parties being in possession of said land.

Mr. LINGENFELTER.—There is no contest over any lands except the lands withdrawn under the Reclamation Act, any other lands being immaterial so far as this action is concerned.

Mr. CLARK.—That is, there is no contest, except those upon which homestead entries exist?

Mr. LINGENFELTER.—Upon withdrawn lands.

Mr. CLARK.—Well, is it agreed that parties have filed upon all of the withdrawn lands under the provisions of the Homestead Act, as provided for in the Reclamation Act, where the right of way of the defendant company passes over the same?

Mr. STOUTEMYER.—Yes. That is covered by our stipulation, that it was filed upon on the dates shown.

Mr. CLARK.—That is the fact, is it?

Mr. STOUTEMYER.—That is as I understand.

Mr. CLARK.—Will my statement be agreed to?

Mr. STOUTEMYER.—Yes.

Mr. CLARK.—I think that will complete our proof.

Mr. STOUTEMYER.—There is one point in

which one of your stipulations is indefinite. You said down to the center line of Section 14. A section has two center lines; one runs north and south and one runs east and west, and it is understood that you refer to the center line running east and west through the section?

Mr. CLARK.—Yes, running east and west. However, as I understand it, below the center line Section 14 has been filed upon by homestead entry.

Mr. STOUTEMYER.—That is included in the stipulation.

Mr. LINGENFELTER.—I would like to recall Mr. Paul for one question.

[Testimony of Charles H. Paul—Recalled for Government.]

CHARLES H. PAUL, recalled as a witness for the Government, testified as follows:

Direct Examination.

(By Mr. LINGENFELTER.)

Q. Mr. Paul, referring back to your testimony to the effect that 8000 acres of land are susceptible of irrigation adjacent to the land under the Minidoka Project proper, what arrangements have been made, if any, for the irrigation of the 8000 acres testified to by you?

A. Do you mean in the line of surveys or construction, or both?

Q. In the construction.

A. The power plant has been constructed large enough to develop power for the pumping of water on to these lands, and the pumping stations have

(Testimony of Charles H. Paul.)

been so constructed that the necessary pumps may be installed to pump the water, three pumping stations.

Mr. LINGENFELTER.—That is all.

Cross-examination.

(By Mr. CLARK.)

Q. You refer to the pumping station for the irrigation of this entire body of land, do you?

A. Yes.

Q. That wasn't constructed particularly for this 8000 acres?

A. The pumping stations which pump water to the 50,000 acres included under the South Side Project are so constructed that additional pumps may be installed for the irrigation of the 8000 acres just adjacent to the project.

Mr. CLARK.—That's all.

The COURT.—Q. Do I understand that this 8000 acres is not included in the project?

A. At the present time, no, sir. That is, no allotment has been made by the Secretary for the construction of works to irrigate this 8,000 acres, with the exceptions—

Q. This 8,000 acres is simply an additional project? A. It is a possible extension.

Q. I understood that it was part of the original project. It is simply a possible extension?

A. A possible extension of the present project, yes.

The COURT.—That is all.

Mr. LINGENFELTER.—That is all. We rest.

After argument by counsel for the respective parties, the following proceedings were had, to wit:

[Proceedings Had After Argument.]

Mr. CLARK.—I will say that Mr. Robinson just informs me that no conveyance, no actual conveyance has been procured for the south half of Section 14. He says that the man in possession of it made no objection, and it was the understanding that settlement would be made with him later, when they get together, that the men had that understanding. Now the only thing I could do, as I understand it, would be to bring some person here who knows that that understanding was had between those parties. I don't know but what you might agree that that was the fact upon Mr. Robinson's statement.

Mr. STOUTEMYER.—We don't know that, and we don't consider that material anyhow.

Mr. CLARK.—Of course, if you don't that is what we could show by bringing another witness here, as I understand it.

Mr. LINGENFELTER.—Of course, if the Court wants to leave it open for you to make further showing, he has a right to do so.

Mr. CLARK.—We couldn't make any further showing than that, as I understand.

The COURT.—Do you desire the case left open for the making of that showing? Of course, I assume, gentlemen, that neither side is standing upon a technicality in this case.

Mr. CLARK.—Would you not agree that our wit-

ness, if we brought him here, would testify as I have stated? You say it is not material. If the Court please, I couldn't get him here before the latter part of next week. I have a case set at St. Anthony for Monday. If, under the showing made here, the Court would consider such testimony as that material,—I myself don't consider it as being very material,—but we can make that showing, if the Court thinks it might be material.

Mr. LINGENFELTER.—You have arrangements made for the conveyance, have you?

Mr. CLARK.—No. He stated to the parties in charge that they could go ahead and construct the road, and that arrangements could be made later. The grading is done all through his land now.

Mr. LINGENFELTER.—It is not the desire of the Government, you know, to take advantage of any technicality in this case. At the same time, it might become material. The Court can leave it open if he desires, and they can make a showing.

The COURT.—Well, I am not sure whether I should consider it material or not. It is for you gentlemen to say whether or not you desire to put it in the record. It may be material.

Mr. CLARK.—When could you hear that proof?

Mr. LINGENFELTER.—I would like to have the case decided as soon as possible; whenever it would accommodate you, however.

Mr. CLARK.—As I say, I have cases set for the first of next week at St. Anthony, and I can come back here a week from to-day and bring this witness.

Mr. LINGENFELTER.—I think, your Honor, we

can agree that if the witness were present he would testify to what is stated.

Mr. CLARK.—That is all we ask.

Mr. LINGENFELTER.—You admit that no conveyance is made?

Mr. CLARK.—Yes, we admit that.

Mr. LINGENFELTER.—We admit that if he were present he would admit that state of facts.

The COURT.—This really amounts to a license then to construct the railroad upon this land, so far as the entryman is concerned, so far as he could give the license.

I think, gentlemen, that I shall adhere to the views expressed at the time of the preliminary hearing. I am unable to see how the railroad could acquire a right of way over lands occupied by the ordinary homestead entryman if the construction is put upon the statute which is now contended for by the Government. I don't think that the act of March 3, 1875, applies to land embraced within a homestead entry, and such, as I understood it, was the contention of the Government before. I thought it was the correct contention at that time, and still think so, that that act applies only to public lands of the United States; and lands which are embraced within a homestead entry are not public lands of the United States. If that view be correct, and if we accept the construction of the other act now urged by the Government, it must be conceded that no one can go upon lands embraced in a homestead entry, even if he has secured a deed from the entryman, without infringing the rights of the United

States. I think that this other act must be held at least to license the occupancy by a railroad of lands embraced in a homestead entry when the permission of the homestead entryman is secured. It isn't a question of a liberal construction of the grant. It is a question of giving a practical construction, as I look at it. I can't see how any other view can be taken and give the law effect.

However, perhaps I cannot add anything to what was said upon that point in the memorandum opinion heretofore filed. The rule undoubtedly is that in the case of a public grant the grant is construed strictly against the grantee in favor of the Government. There are some considerations held to differentiate the grant of a right of way for the construction of a public highway which is presumably for the public interest from a grant the beneficial interest of which is entirely with the grantee. However, I do not regard such considerations as highly material at this time. As already suggested, it isn't a question of liberally construing the act referred to in favor of the grantee, but of giving to it a construction which makes it effective for any purpose. It would be idle to say to a homestead entryman: "You may grant to a railroad a right of way across your land and warrant the right as against your own acts," if, after the railroad company pays the entryman the purchase price for such right of way and takes a deed, when it undertakes to make use of its purchase, the Government may step in with an injunction and restrain the railroad company from proceeding to construct a railroad upon that right of

way because the Government's primary title has not been extinguished, especially in view of the fact that there is no legal method for extinguishing such title or acquiring license from the Government other than the method here pursued. It seems to me that this is the logical and only conclusion that the Government's contention leads to. I may be wrong, but I can't see it in any other way at present, and the considerations which were urged to-day do not seem to me to require or justify receding from the position heretofore taken.

Unless there is some authority other than those to which reference has been made, that is, the two cases cited from the 25th and 26th Federal, with regard to issuing an injunction to protect the Government's interest, I see no reason for adopting a different view from that expressed before, and that is, that an injunction will not issue in favor of the Government where it is not injured, where its rights are not invaded.

Now it is agreed here that if the Court requires the railroad company to put in bridges of a certain character no injury results to the Government. The safety of the canals is not jeopardized, the flow of the water is not interfered with, their utility is in no wise affected or diminished. Provision will be made, of course, in the decree for the maintenance of these bridges, and some proper provision will also be made for passageways.

Nor am I able to take the view that this reservation by the Government of a right of way over the public lands is the reservation of the fee. It seems

to me that the only practical view to take of that is that Congress intended to reserve to the Government an easement. An easement subserves every needful purpose; it enables the Government to carry out in full its irrigation plans. It is quite evident to my mind that it was the intention of Congress to reserve to the Government only the right to construct and maintain its canals across these lands for irrigation purposes, and in that view it holds the right to occupy only such portion of the land and make such use of it as may be reasonably necessary to carry out this purpose, and the land which it may occupy may be a wider or a narrower strip, as the necessities require. It couldn't keep a farmer from growing grass or hay upon land right up to the water line of the canal, provided the growth of the grass or hay doesn't interfere with the use of the land by the Government for irrigation purposes. It would, I think, be unreasonable to construe the law to the effect that the Government may go in and take a strip of land 100 feet wide, whether it needs it or not, for its canals, and thus keep the farmer from utilizing the surface of the strip merely because somebody may think that at some time it would be a little more convenient to have so wide a strip. If a farmer desires to utilize the land right up to the bank of the existing canal he may do so; he may plant his crops and sow his grain, but if it becomes necessary for the Government to pass over his grass or grain in order to maintain the canal, it has a right to do so. His rights are subject to the uses of the Government of the land for a cer-

tain purpose, its reasonable use for a certain purpose; but the farmer is not excluded entirely. In other words, he has the primary title, the principal title, and the Government retains an easement for the purposes specified. If, as is contended, the Government retains the fee to the right of way, what passes by patent to the entryman? The Government claims the legal right to appropriate any or every part of the entry, as it may have need, for rights of way; if so, and if it retains the fee of the right of way, then how can the patent operate to convey to the entryman the fee of any portion of the tract?

So far as I know, no construction has been put upon this act, and I assume that no Court has construed it or the decision would be called to my attention, but until there is some authoritative construction contrary to this I shall take that view; that is, that the Government retains an easement only.

Mr. LINGENFELTER.—Of course, it is understood that the Government waives no legal right by reason of its stipulation that the bridges, if constructed in the manner agreed upon, will not interfere with the flow of the water or jeopardize the safety of the canals.

The COURT.—You had that in twice, that you waive no right. That is the reason why I asked you the question as to whether or not the flow of the water would be interfered with or the safety of the canal jeopardized. It has been my purpose from the beginning to require that the Government not be

injured. The Government has the right to occupy those canals and to use them, and use them conveniently; in other words, its right against the railroad company is the same as its right against the farmer. The Government has a right to pass up and down the canal for all reasonable purposes. As I said a moment ago, if a farmer chooses to sow his grain right up to the banks of the canal he may do so, with the possibility all the time that the canal riders will trample down some of it; if so, none of his rights are interfered with, because his rights are subject to those of the Government. So with the railroad company. I am simply trying to construe these laws in such a way as to fully protect every reasonable claim of the Government, every right, so that it may carry out its scheme of irrigation here and yet not impede the reasonable development of the country, and prevent the use of the land by farmers and others for purposes which do not interfere with canal construction or maintenance.

Mr. LINGENFELTER.—Does the Court care to make any intimation with respect to the regulation of future canals?

The COURT.—I do not.

[Certificate Re Facts.]

It is hereby certified that the foregoing, together with the exhibits and other papers therein referred to, in substance sets forth the facts upon which the decree herein was entered.

Dated this 19th day of December, 1910.

FRANK S. DIETRICH,
District Judge.

Filed, December 19th, 1910. A. L. Richardson,
Clerk.

*In the Circuit Court of the United States in and for
the District of Idaho, Central Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),

Defendant,

Order [Re Decree].

It being made to appear that it will be necessary to use temporary structures for the purpose of installing the permanent bridges provided for in the decree this day signed and filed herein, it is ordered that said decree be not construed so as to prohibit the installation and use of such necessary temporary structures, or to prohibit interference with the lateral ditches belonging to the plaintiff, to such an extent as may be necessary in installing the siphons and other conducts called for by the decree; provided, that the defendants must not interrupt the flow of water or diminish the amount of the delivery of water through any of said canals or ditches while installing the permanent structures, without first procuring the written consent of the plaintiff's

authorized representatives.

Dated this 15th day of July, 1910.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 15, 1910. A. L. Richardson,
Clerk.

*In the Circuit Court of the United States for the
District of Idaho, Central Division.*

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant and Plaintiff in Error,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and UTAH
CONSTRUCTION COMPANY (a Corpora-
tion),
Defendants and Defendants in Error.

Assignment of Errors.

And now comes the United States of America,
plaintiff in error, and files this its assignment of er-
rors.

1. The United States Circuit Court of the Dis-
trict of Idaho, Central Division, erred in refusing
the plaintiff's application and petition for an injunc-
tion restraining the defendants from going upon
and occupying the irrigable lands of the plaintiff's
Minidoka Project described in the complaint and
withdrawn by the Secretary of the Interior under
the second form authorized by the Act of Congress

of June 22, 1902 (32 Stat. L. 388), and particularly the following subdivisions:

The SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 19, T. 10 S., R. 23 E.
Sec. 30, T. 10 S., R. 23 E., B. M.

The SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 25, T. 10 S., R. 22 E.,
B. M. Sec. I, T. 11 S., R. 22 E., B. M. Sec.
11, T. 11 S., R. 22 E., B. M. Sec. 12, T. 11
S., R. 22 E., B. M. Sec. 14, T. 11 S., R. 22
E., B. M.

2. That said Circuit Court of the District of Idaho erred in refusing to enjoin the defendants from building thereon and excavating and digging out and throwing up a railroad line and railroad grade on and across said above described subdivisions of land or any of them.

3. That said Circuit Court of the District of Idaho erred in refusing to enjoin said defendants from so digging out, occupying and throwing up said lands without the consent or approval of the Secretary of the Interior.

4. That the said Circuit Court of the District of Idaho erred in refusing to enjoin or restrain the defendants from destroying portions of said withdrawn lands and rendering them useless for agricultural and irrigation purposes.

5. That the said Circuit Court of the District of Idaho erred in refusing to enjoin the defendants from occupying, digging out and throwing up portions of said lands into a railroad grade and railroad line on and across those portions of said above described subdivisions which are included in the entries of homestead entrymen from whom said de-

fendants have not obtained deeds or contracts, particularly the South half (S. 1½) of Sec. fourteen (14), Twp. eleven (11) South, Range twenty-two (22) East, B. M.

6. That the said Circuit Court of the District of Idaho erred in signing and filing the final decree herein and particularly that part thereof refusing the plaintiff's petition for relief by injunction and restraining orders as prayed for in the complaint.

S. L. TIPTON,

Asst. United States Attorney for the District of Idaho.

[Endorsed]: Filed Dec. 13, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the
Central Division of the District of Idaho.*

THE UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),

Defendants.

Petition on Appeal With Allowance Endorsed.

To the Honorable FRANK S. DIETRICH, District
Judge, and Judge of the above-named Court
Presiding therein:

The above-named complainant in the above-entitled cause conceiving itself aggrieved by the order

and decree made and entered by the above-named court in the above-entitled cause under date of July 15, 1910, wherein and whereby it was and is ordered, that the complainant's prayer for an injunction and restraining order against the defendants herein is denied, except as to the crossings over the several canals and laterals constructed by the complainant, and particularly from that part thereof which provides;

“1st. That the complainant's prayer for an injunction and restraining order against the defendants herein is denied except as to the crossings over the several canals and laterals constructed by the complainant which crossings are more particularly described below.”

for the reasons set forth in the assignment of errors which is filed herewith, and the complainant prays that its petition for its said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 13th, 1910.

S. L. TIPTON,

Asst. U. S. Attorney for District of Idaho, Boise,
Idaho.

B. E. STOUTEMYER,

Attorney, Boise, Idaho.

Attorneys for Complainant.

Order [Granting Appeal].

The foregoing petition on appeal is granted, and the claim of appeal therein made is allowed.

Done in open court this 13th day of December, 1910.

FRANK S. DIETRICH,
District Judge, and Judge of the said United States
Circuit Court presiding therein.

[Endorsed]: Filed Dec. 13, 1910. A. L. Richardson, Clerk.

*In the Circuit Court of the United States for the
District of Idaho, Central Division.*

UNITED STATES OF AMERICA,

Complainant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),

Defendants.

Order to Send Up Original Exhibits.

On motion of C. H. Lingenfelter and B. E. Stoutemyer, attorneys for complainant;

It is ordered that in addition to the transcript of the record on appeal in this action, that the Clerk of this court transmit to the Clerk of the United States Circuit Court of Appeals at San Francisco, California, the following original papers in this action to be by him safely kept and returned to this

Court upon the final determination of this action in said Court of Appeals, namely:

Plaintiff's Exhibit "A."

Plaintiff's Exhibit "B."

Defendants' Exhibit 1-2.

Map attached to Bill of Complaint.

Map attached to Answer of Defendant Minidoka & Southwestern Railroad Company, marked Exhibit "A."

Dated this 14th day of December, 1910.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Dec. 14, 1910. A. L. Richardson, Clerk.

In the Circuit Court of the United States Ninth Judicial Circuit for the District of Idaho, Central Division.

IN EQUITY—No. 71.

THE UNITED STATES OF AMERICA,

Complainant and Appellant,

vs.

MINIDOKA & SOUTHWESTERN RAILWAY
COMPANY (a Corporation), and UTAH
CONSTRUCTION COMPANY (a Corporation),

Defendants and Appellees.

Praeipie for Transcript on Appeal.

To the Clerk of the Above-entitled Court:

An appeal having heretofore been perfected in the above-entitled cause to the Circuit Court of Appeals

for the Ninth Circuit, you are hereby requested to prepare a transcript of the record for transmission to the said Appellate Court at San Francisco, California, on behalf of the United States of America, Complainant and Appellant.

Dated this 22. day of December, 1910.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho and
Counsel and Solicitor for Complainant and Appellant.

*In the Circuit Court of the United States in and for
the District of Idaho, Central Division.*

UNITED STATES OF AMERICA,
Complainant and Appellant,
vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY (a Corporation), and THE
UTAH CONSTRUCTION COMPANY (a
Corporation),
Defendants and Respondents.

Citation [Original].

United States of America,—ss.

The President of the United States, to Minidoka & Southwestern Railroad Company, the Utah Construction Company, and D. Worth Clark and P. L. Williams, their Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San

Francisco in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein the United States of America is plaintiff and you are defendants in error, to show cause if any there be, why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable FRANK S. DIETRICH, Judge of the United States Circuit Court in and for the Central Division, District of Idaho, this 13 day of December, 1910.

FRANK S. DIETRICH,
Circuit Judge.

Service of the within Citation and receipt of a copy thereof admitted this 14th day of December, 1910.

P. L. WILLIAMS,
D. WORTH CLARK,
Attorneys for Defendants and Respondents.

[Endorsed]: No. 71. In the Circuit Court of the United States for the District of Idaho, Central Division. The United States of America, Complainant and Appellant, vs. Minidoka & Southwestern Railroad, a Corporation, and Utah Construction Company, a Corporation, Defendants and Appellees. Citation. Filed Dec. 16, 1910. A. L. Richardson, Clerk. B. E. Stoutemyer, Attorney, Boise, Idaho.

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

[Certificate of Clerk U. S. Circuit Court to Record.]

In the Circuit Court of the United States Ninth Judicial Circuit for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA,
Complainant and Appellant,
vs.

MINIDOKA & SOUTHWESTERN RAILWAY
COMPANY (a Corporation) and UTAH
CONSTRUCTION COMPANY (a Corpora-
tion),

Defendants and Appellees,

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 124, inclusive, to be full, true and correct copies of the pleadings and proceedings, except the original exhibits, in the above-entitled cause, and that the same together constitute the transcript of

the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said Circuit Court, affixed at Boise, Idaho, this 22nd day of December, 1910.

[Seal]

A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1930. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. The Minidoka & Southwestern Railroad Company (a Corporation), and The Utah Construction Company (a Corporation), Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Idaho, Central Division.

Filed December 27, 1910.

F. D. MONCKTON,
Clerk.



OREGON SHORT LINE RAILROAD
NORTH & SOUTHWESTERN RAILROAD
OAKLEY BRANCH

ALIGNMENT MAP

OAKLEY TO OAKLEY, IDAHO

POST 0 TO MILE POST 21.75

SCALE 400' TO 1"

ENGINEER'S OFFICE, SALT LAKE CITY, UTAH, OCTOBER 27, 1905

DRAWING NO 14213
FILE NO 363 B

Case No. 1930
 SUPREME COURT OF APPEALS
 FOR THE NINTH CIRCUIT COURT
 EXH. B. T. "A"
 Received DEC 27 1910.
 ED MONTGOMERY
 Clerk

T10S-R22E-B
 T10S-R23E-B

LOT 4
 Tract Outlined in Red
 Jacob T. Spencer
 Homestead Entry 342.0305
 Nov 30 1904
 Contested

Tract Outlined in Yellow
 Lorenzo W. Robbins
 Homestead Entry 19.1904
 May 19 1904
 Conf.

LOT 1
 ROBERTS EX. 100

W. B. Tolman & Wife
 Warranty Deed Jan 8 1910
 Consideration \$100
 Recorded Book Page

Geo P. Clark's Wife
 Warranty Deed Nov 13 1909
 Recorded Nov 24 1909
 Book 12 Page 328
 Consideration \$75

D. A. Taylor & Wife
 Warranty Deed Nov 13 1909
 Recorded Nov 24 1909
 Book 12 Page 327
 Consideration \$200

R. G. Gunnar & Wife
 Warranty Deed Jan 10 1910
 Consideration \$300
 Recorded Book Page

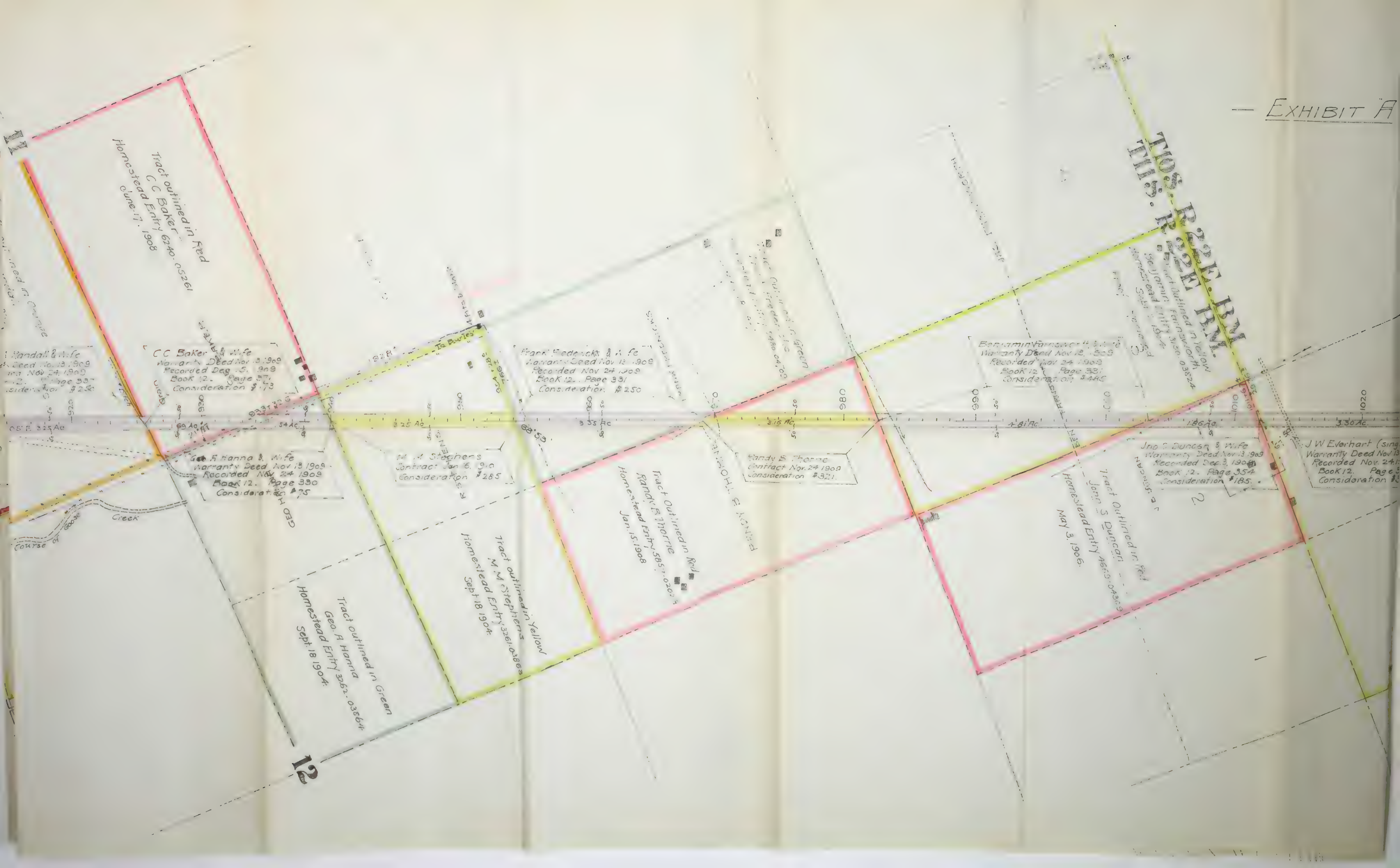
LEGEND
 Right of Way Required by Deeds
 Right of Way Covered by Agreement to Sell
 Lands Withdrawn from entry July 24 1908
 Not June 7 1902
 Lands opened to entry Feb 4 1909
 No Vacant Government Land

T10S. R22E. BM.
 T10S. R23E. BM.

Tract Outlined in Red
 David R. Taylor
 Homestead Entry 02324
 Dec 17 1908

Tract Outlined in Green
 Edward R. Guffman
 Homestead Entry 03106
 July 12 1909

Tract Outlined in Orange
 J. P. Gunnar & Wife
 Warranty Deed Jan 10 1910
 Consideration \$300
 Recorded Book Page



Tract outlined in Purple
Farm D. Entry 561-0483
Homestead Oct 13 1907

Ernest H. Boutler

John A. Hahn

Tract Outlined in Red
Homestead Entry 562-04796
John Oct 9, 1907

L. W. Haff & Wife
Warranty Deed Nov. 300
Recorded Dec 3 909
Book 12 Page 354
Consideration \$4500

Tract outlined in Green
L. W. Haff
Homestead Entry 06513
July 28 1909

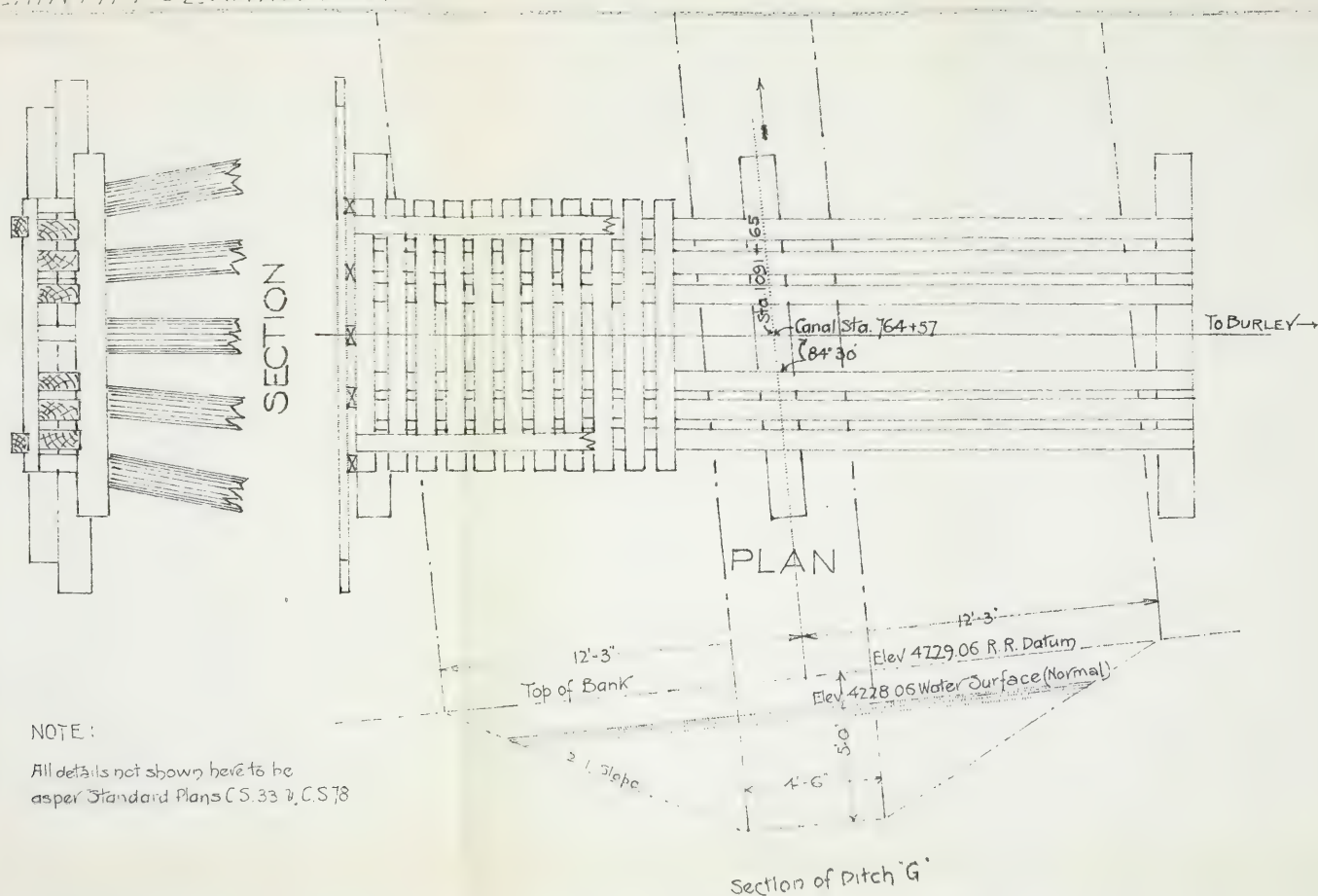
John W. Durigan & Wife
Contract 272 1910
Consideration \$1500

Tract outlined in Purple
John W. Durigan
Homestead Entry 05505
May 1909

C. A. Best Peterson
Warranty Deed Nov 18 909
Recorded Nov 24 1909
Book 12 Page 329
Consideration \$2500

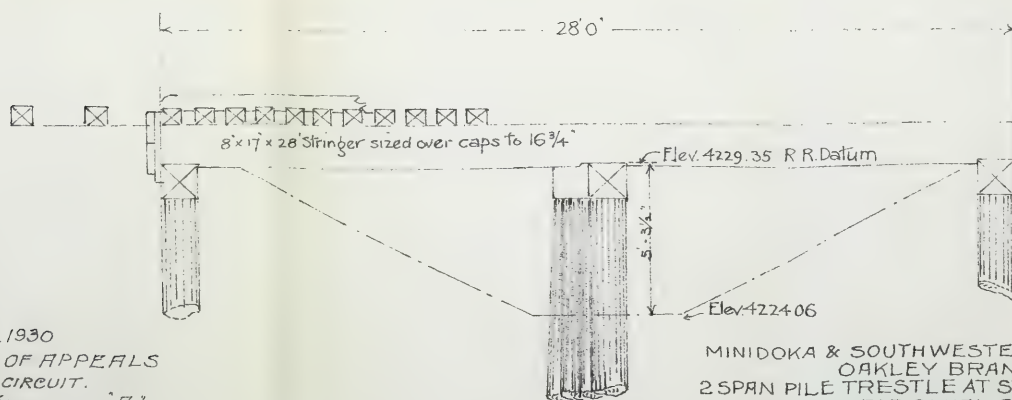
Tract outlined in Red
C. Albert Peterson
Homestead Entry 5380099
Aug 30 1907

PLAINTIFFS EXHIBIT "A"



NOTE:

All details not shown here to be
as per Standard Plans C.S. 33 & C.S. 78

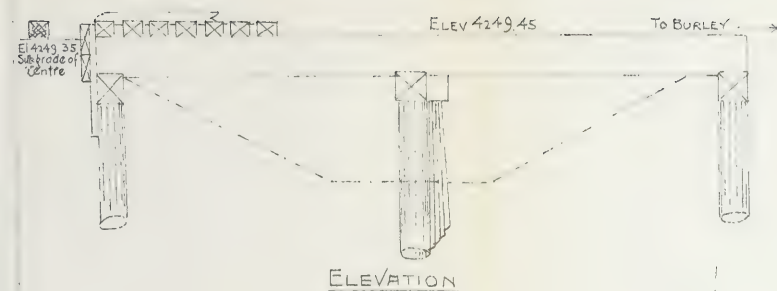


ELEVATION

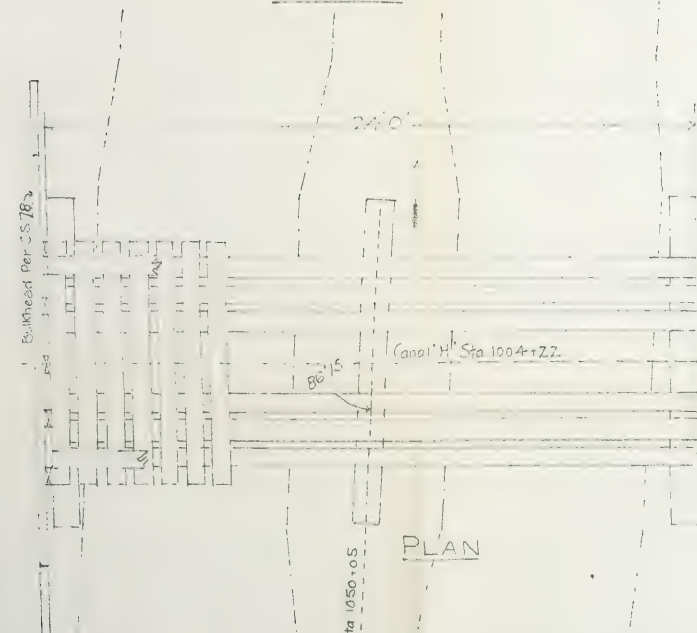
Case No. 1930
U.S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
PLAINTIFFS EXHIBIT "A"
Received DEC. 27, 1910.
F.D. MONCKTON, Clerk

MINIDOKA & SOUTHWESTERN RAILROAD
OAKLEY BRANCH
2 SPAN PILE TREESTLE AT STATION 1091-65
FOR CANAL G
MINIDOKA PROJECT U.S. RECLAMATION SERVICE
SCALE 1/4" TO 1"
CHIEF ENGINEERS OFFICE, U.S. L.R. SALT LAKE CITY, UTAH
MAY 1910

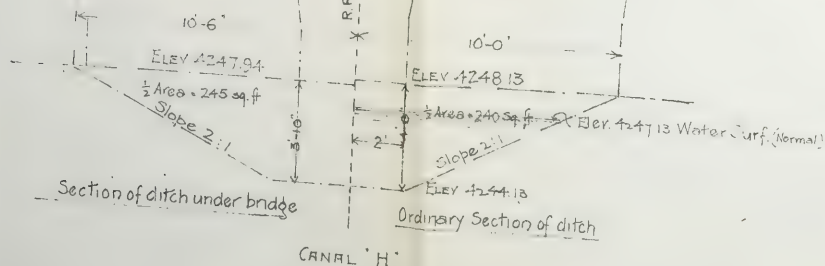
PLAN DRAWN FROM INFORMATION FURNISHED BY
ASSISTANT ENGINEER R. B. ROBINSON
DRAWN BY E.J.W. TRACED BY E.J.W. CHECKED BY E.A.P.
DRAWING NO. 14915
FILE NO. 435 B.



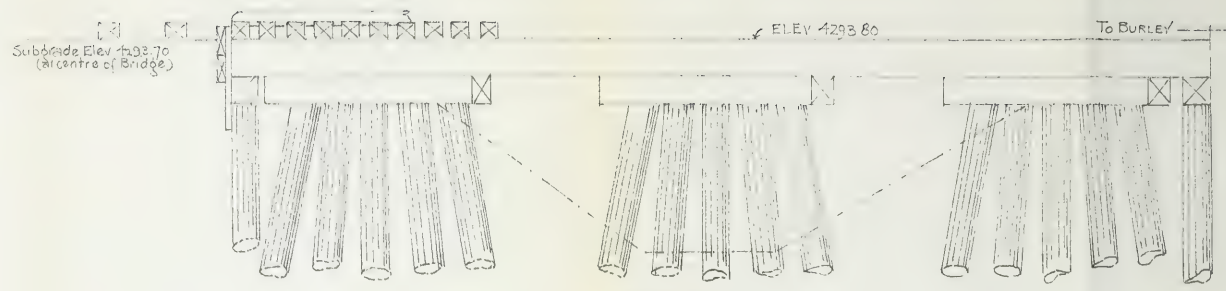
ELEVATION



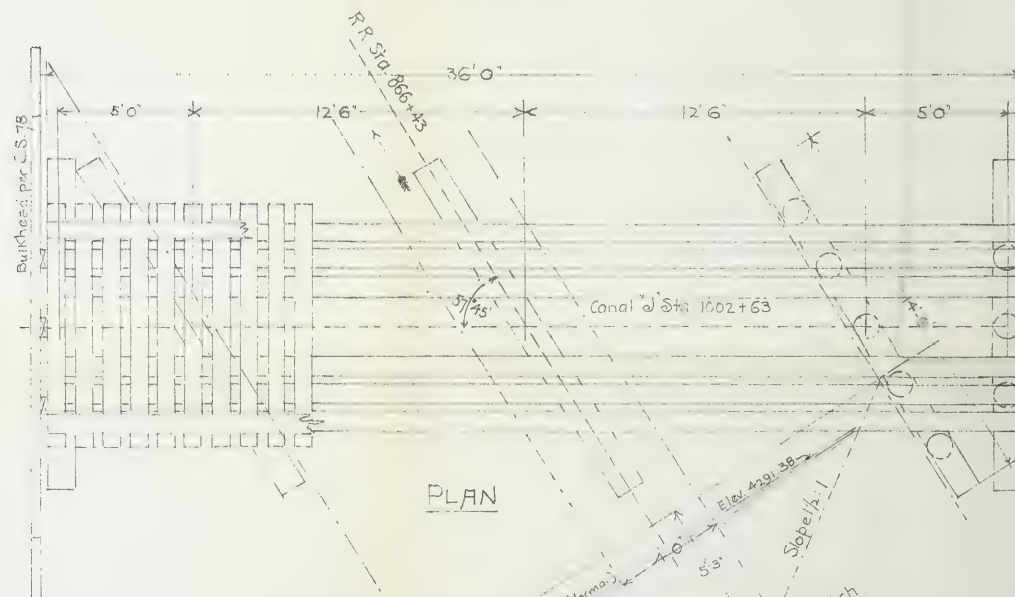
PLAN



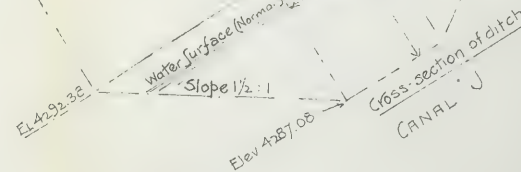
CANAL H



ELEVATION



PLAN

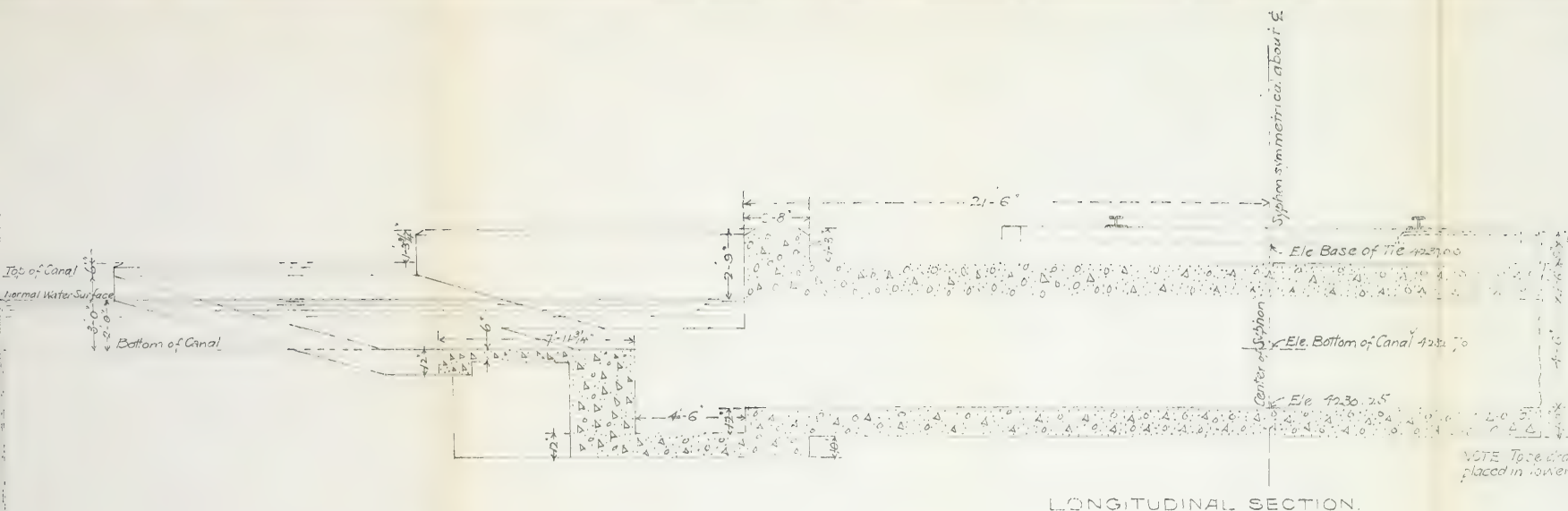


CANAL J

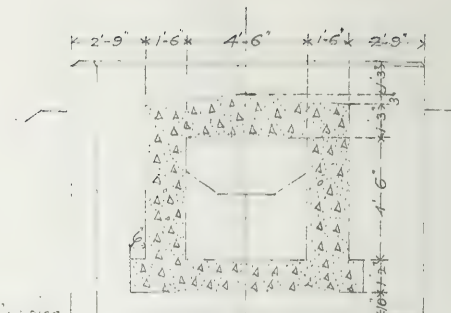
NOTE:
All details not shown here, to be
as per Standard Plans, C.S. 33 and C.S. 78.

MINIDOKA SOUTHWESTERN RAILROAD
OAKLEY BRANCH
2 SPAN PILE TRETTLES AT STATIONS 866+43 & 1050+05
FOR CANALS J & H
MINIDOKA PROJECT, U.S. RECLAMATION SERVICE
SCALE: 1/4" TO 1"
CHIEF ENGINEER'S OFFICE, O.S.L.R.R., SALT LAKE CITY, UTAH, MAY, 1910.
PLAN DRAWN FROM INFORMATION FURNISHED BY ASSISTANT ENGINEER, R.B. ROBINSON
DRAWN BY E.W.W., TRACED BY E.O.W., CHECKED BY E.A.P.

DRAWING NO. 14921
FILE NO. 435 B.

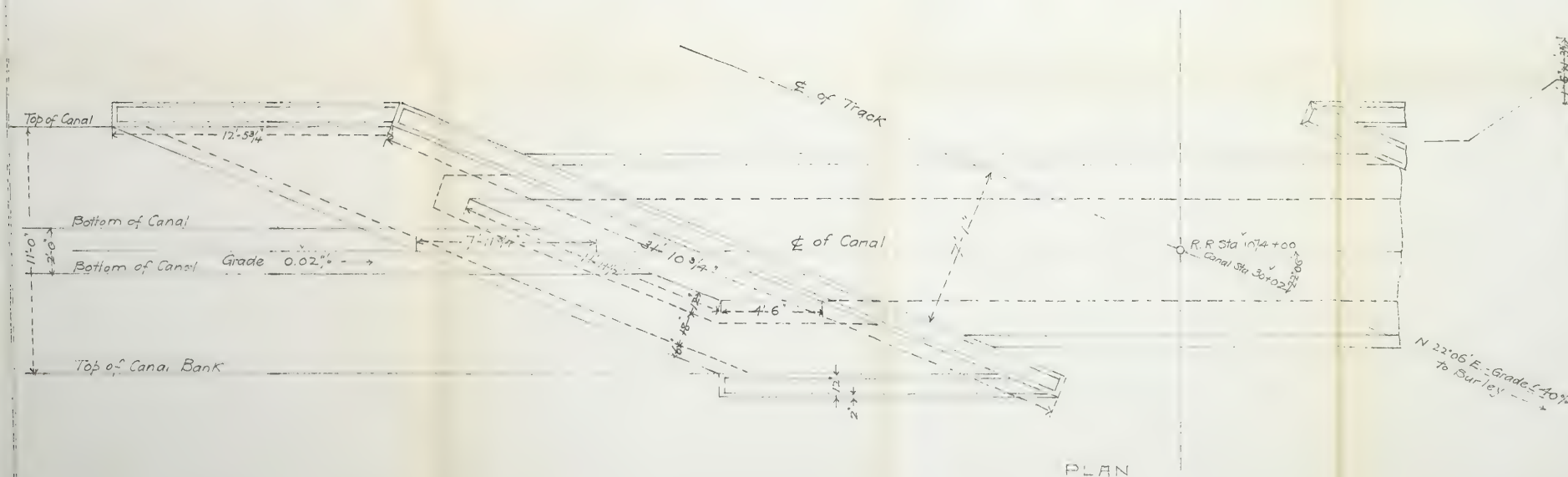


LONGITUDINAL SECTION.

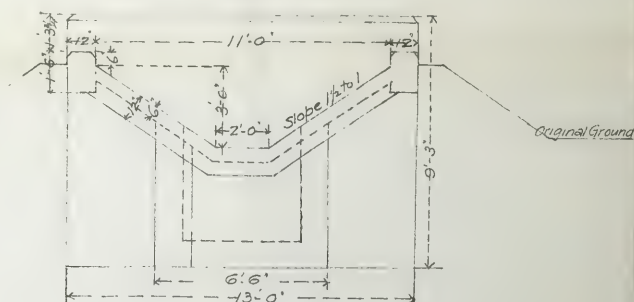


CROSS SECTION

Material required
20,650 cu. yds. concrete.



PLAN



END VIEW.

MINIDOKA & SOUTHWESTERN RAILROAD —
OAKLEY BRANCH

PLAN OF SYPHON 4'-6\"/>

AT STATION 1074+00 FOR CANAL H 26

MINIDOKA PROJECT, U.S. RECLAMATION SERVICE

SCALE: 1/4\"/>

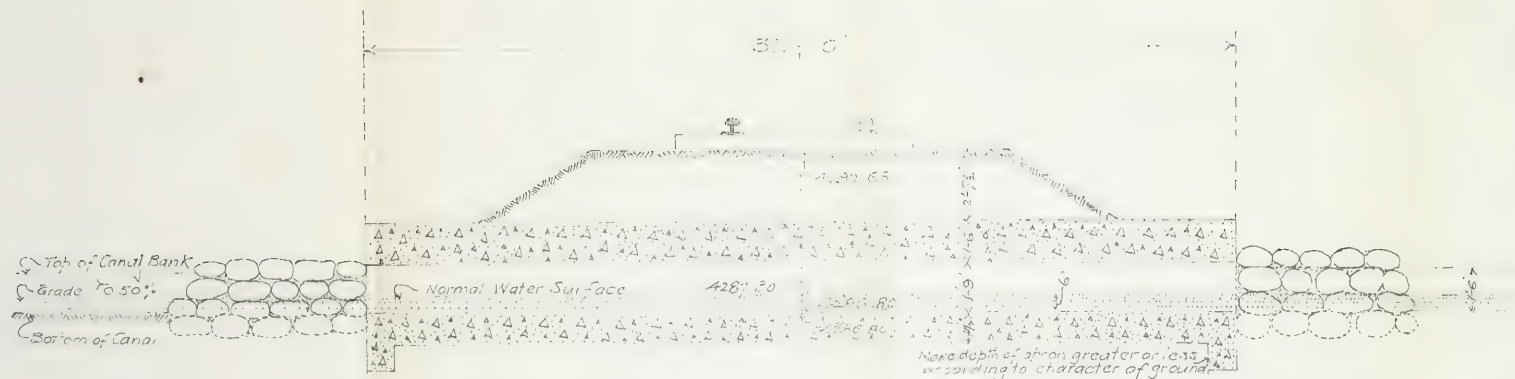
CHIEF ENGINEER'S OFFICE, O.S.L.R. R. SALT LAKE CITY, UTAH, MAY, 1910

PLAN DRAWN FROM INFORMATION FURNISHED BY ASSISTANT ENGINEER R. B. ROBINSON

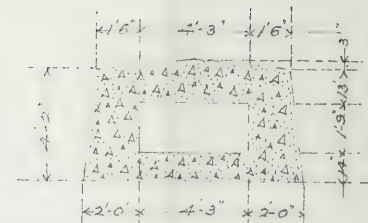
DRAWN BY L.F.Z. TRACED BY L.F.Z. CHECKED BY E.A.B.

DRAWING NO. 14916
FILE NO. 1506 L.

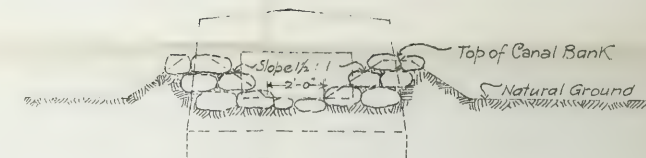
MINIDOKA 9, SOUTHWESTERN RAILROAD
3" Curbs Concrete



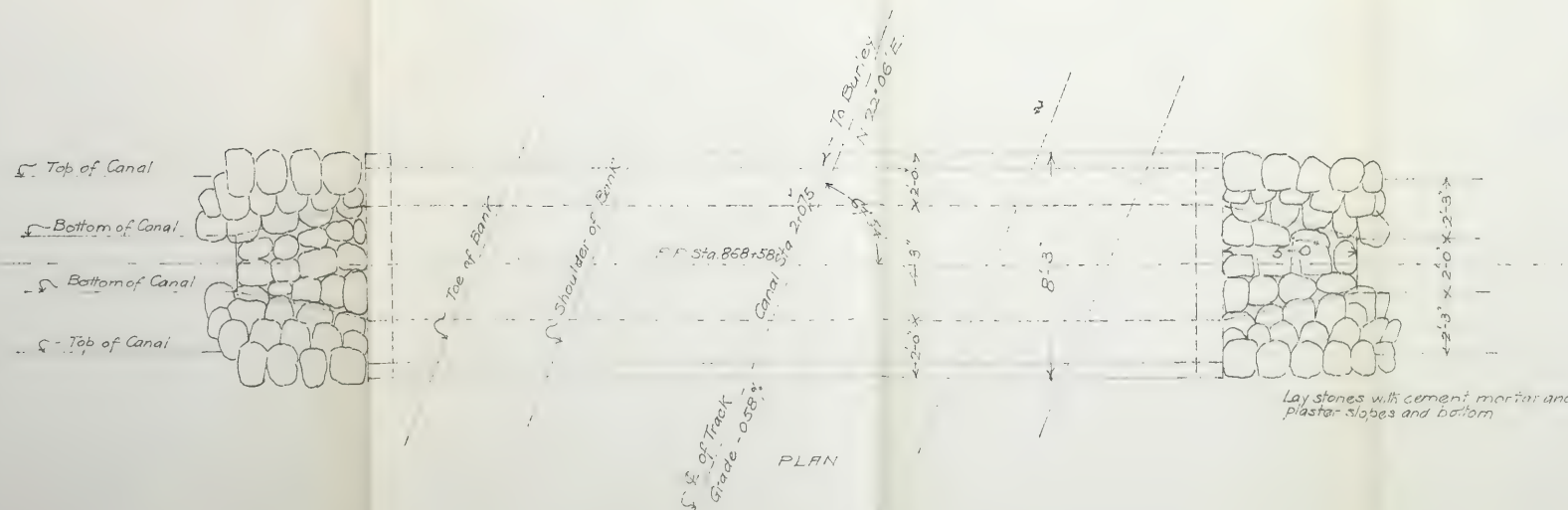
SECTION ON J OF CULVERT



CROSS SECTION



END VIEW



PLAN

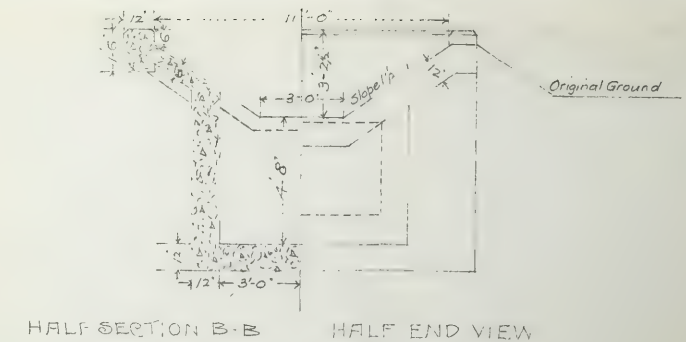
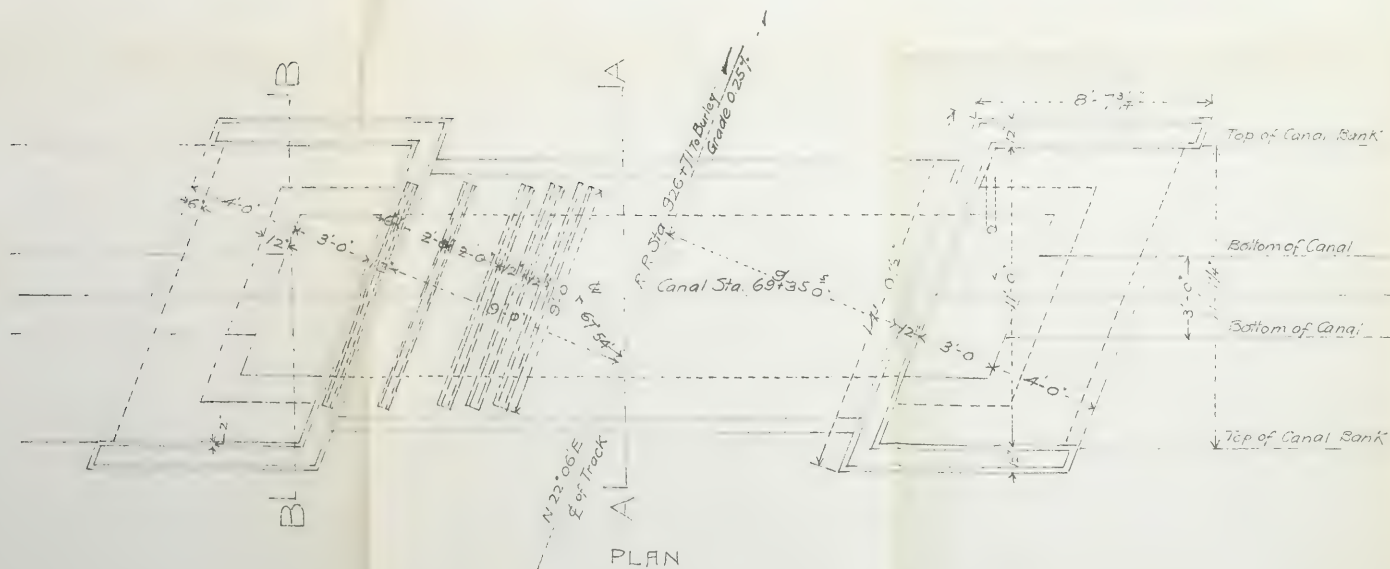
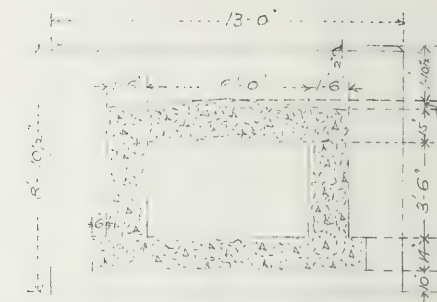
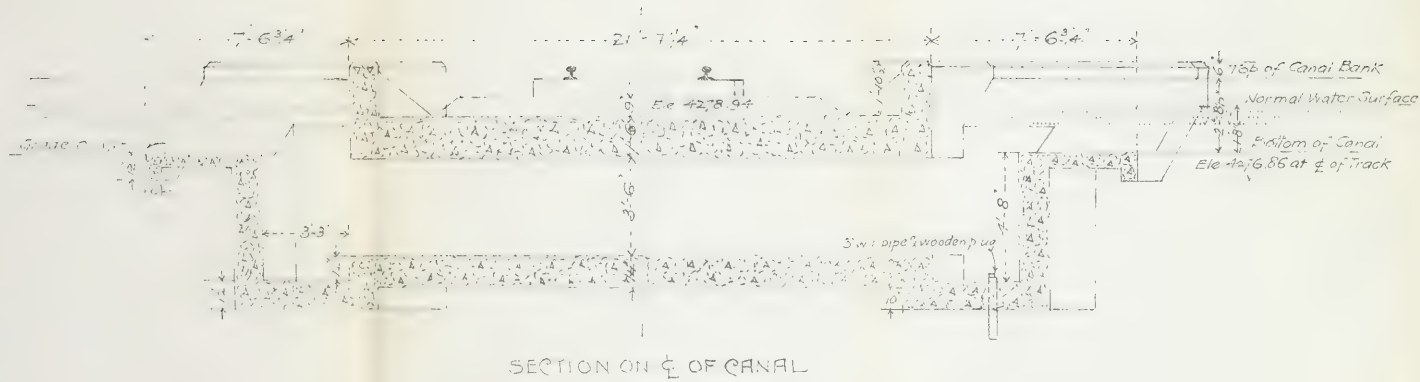
MINIDOKA 9, SOUTHWESTERN RAILROAD
OAKLEY BRANCH
PLAN OF CONCRETE CULVERT 4'-3" x 1'-9"
AT STATION 868+58 FOR CANAL J 30
MINIDOKA PROJECT, U.S. RECLAMATION SERVICE
SCALE: 1/4" TO 1'

CHIEF ENGINEER'S OFFICE, U.S. R.R. SALT LAKE CITY UTAH MAY, 1910.
PLAN DRAWN FROM INFORMATION FURNISHED BY ASSISTANT ENGINEER R.B. ROBINSON
DRAWN BY G.M.D. TRACED BY W.E.S. CHECKED BY F.A.P.

DRAWING NO. 14920
FILE NO. 1506 L.

Material Required

Concrete 45 cu. yds
16 cu. ft. 9' long



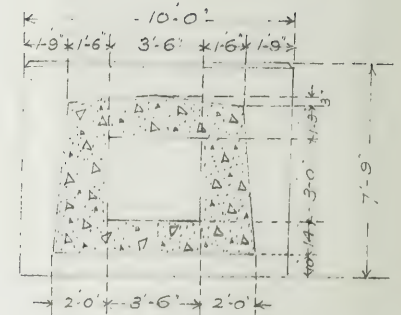
MINIDOKA & SOUTHWESTERN RAILROAD
OAKLEY BRANCH
PLAN OF REINFORCED CONCRETE SYPHON 6'x 3'-6"
AT STATION 926+71 FOR CANAL J 32
MINIDOKA PROJECT, U.S. RECLAMATION SERVICE
SCALE: 1/4" TO 1'
CHIEF ENGINEERS OFFICE, O.S. & S.W. R.R. SALT LAKE CITY, UTAH, MAY, 1910.
PLAN DRAWN FROM INFORMATION FURNISHED BY ASSISTANT ENGINEER R.B. ROBINSON
DRAWN BY L.F.Z. TRACED BY C.A.R. CHECKED BY E.A.P.

DRAWING NO. 14919
FILE NO 1506 L

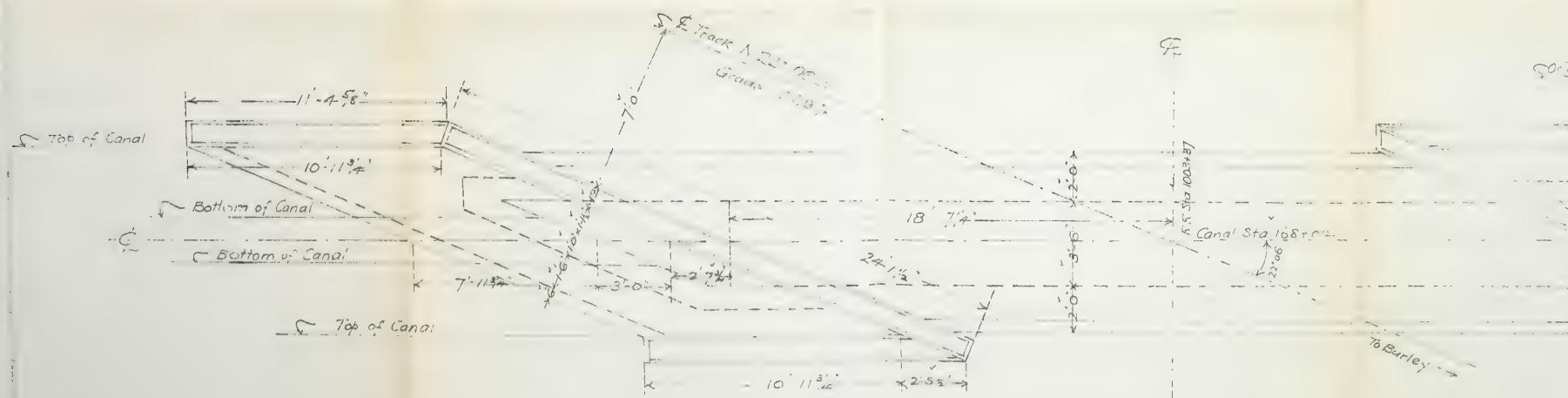


Note -
 1. The concrete siphon is to be constructed of 3'-6\"/>

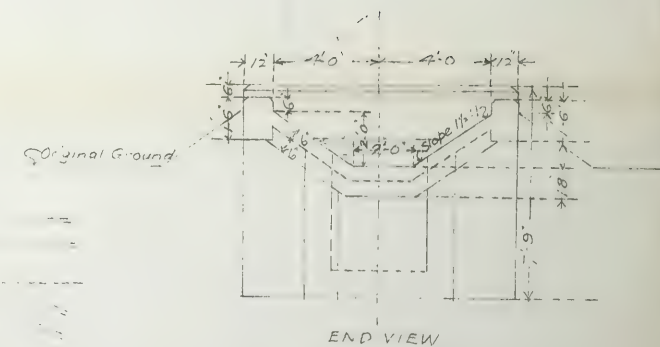
LONGITUDINAL SECTION



CROSS SECTION



PLAN



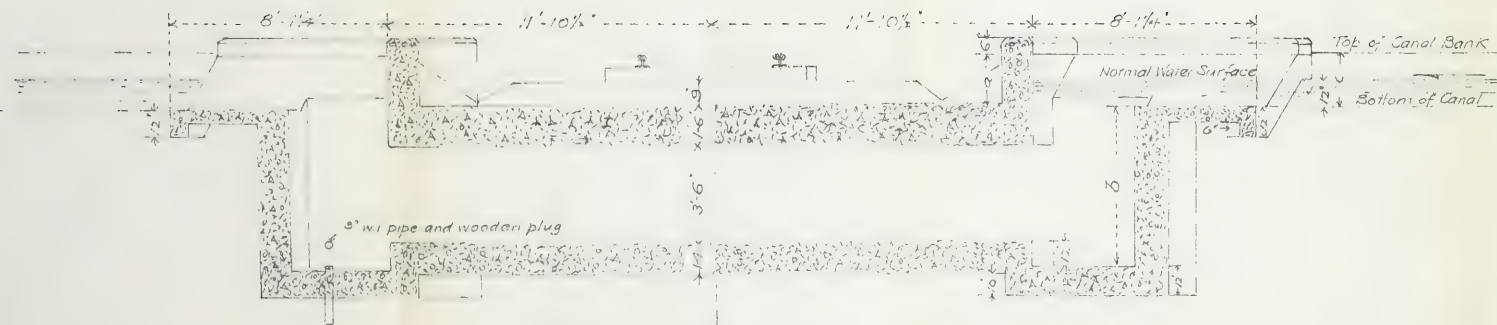
END VIEW

Material :-
 61 Cu Yds of Concrete.

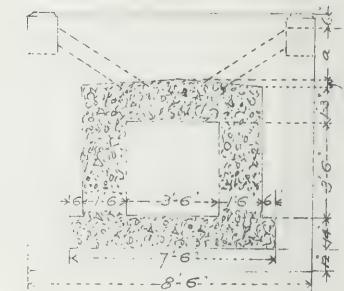
MIN. DOKA & SOUTHWESTERN RAILROAD
 OAKLEY BRANCH
 PLAN OF CONCRETE SYPHON 3'-6\"/>

DRAWING NO. 14918
 FILE NO. 1506 L.

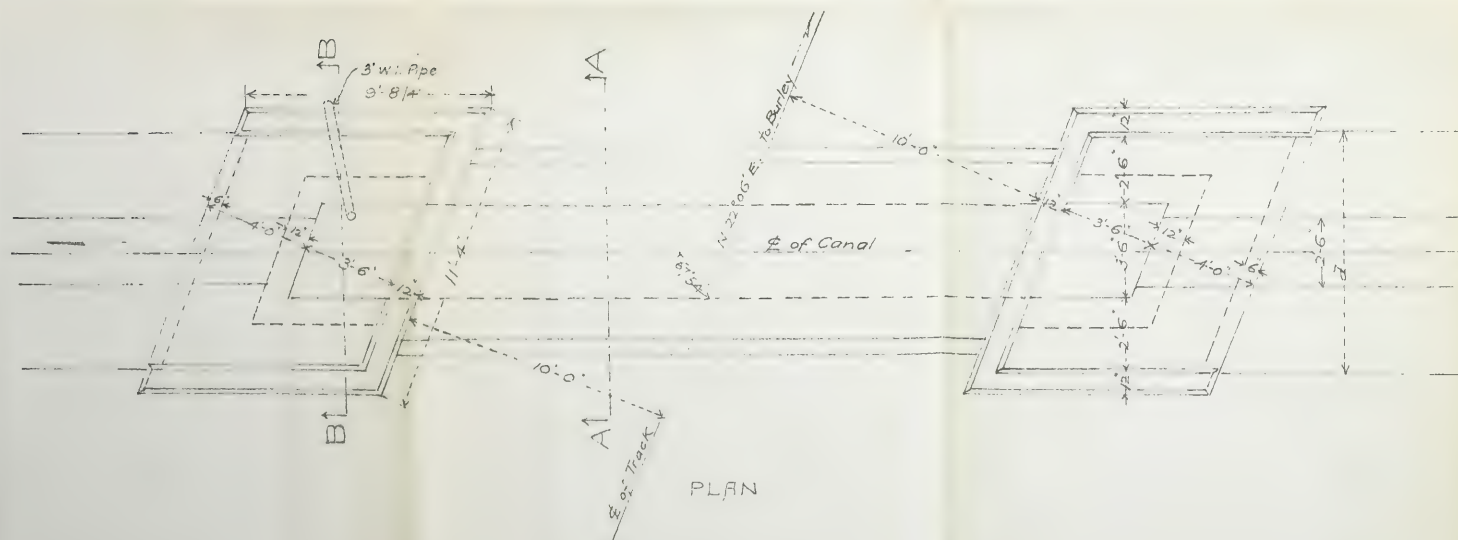
Name of Canal	R.R. Sta	Canal Sta	Elevations from R.R. Datum				Grade of R.R. Track	Grade of T. Survey	Dimensions				Contents Cu Yds. Concrete
			Bottom of Canal	Water Surface	Top of Bank	Base of Bank			a	b	c	d	
H 26 A	1055+50	6+80	4245.10	4246.10	4246.10	4245.10	0.00%	-0.55%	10'-5'-10"	2'-0"	8'-6"		40.0
J 32 F	1012+04	3+28.5	4254.30	4255.40	4255.40	4254.30	0.02%	-0.48%	1'-4"	5'-2 7/8"	2'-1 1/4"	8'-10"	39.0



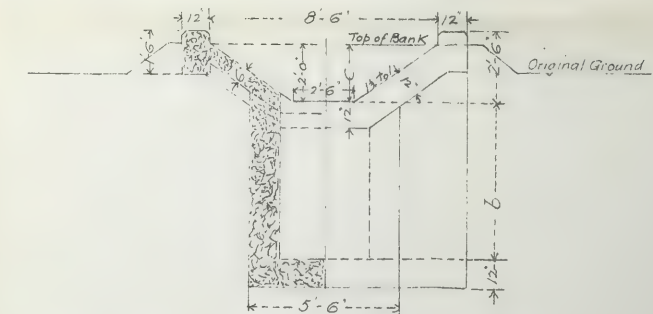
SECTION ON C OF CANAL



SECTION A-A



PLAN



HALF SECTION B-B HALF END VIEW

MINIDOKA & SOUTHWESTERN RAILROAD
OAKLEY BRANCH

PLAN OF CONCRETE SYPHON 3'6" x 3'6"

AT STATIONS 1055+50 & 1012+04

FOR CANALS H 26 A & J 32 F RESPECTIVELY
MINIDOKA PROJECT, U.S. RECLAMATION SERVICE

SCALE: 1/4" TO 1'

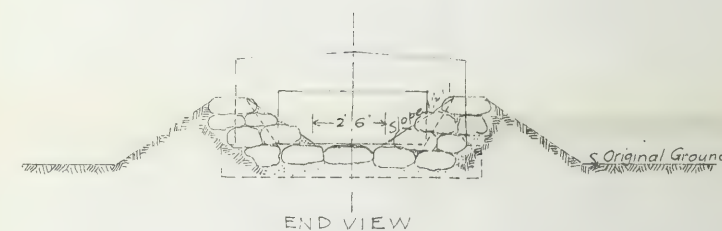
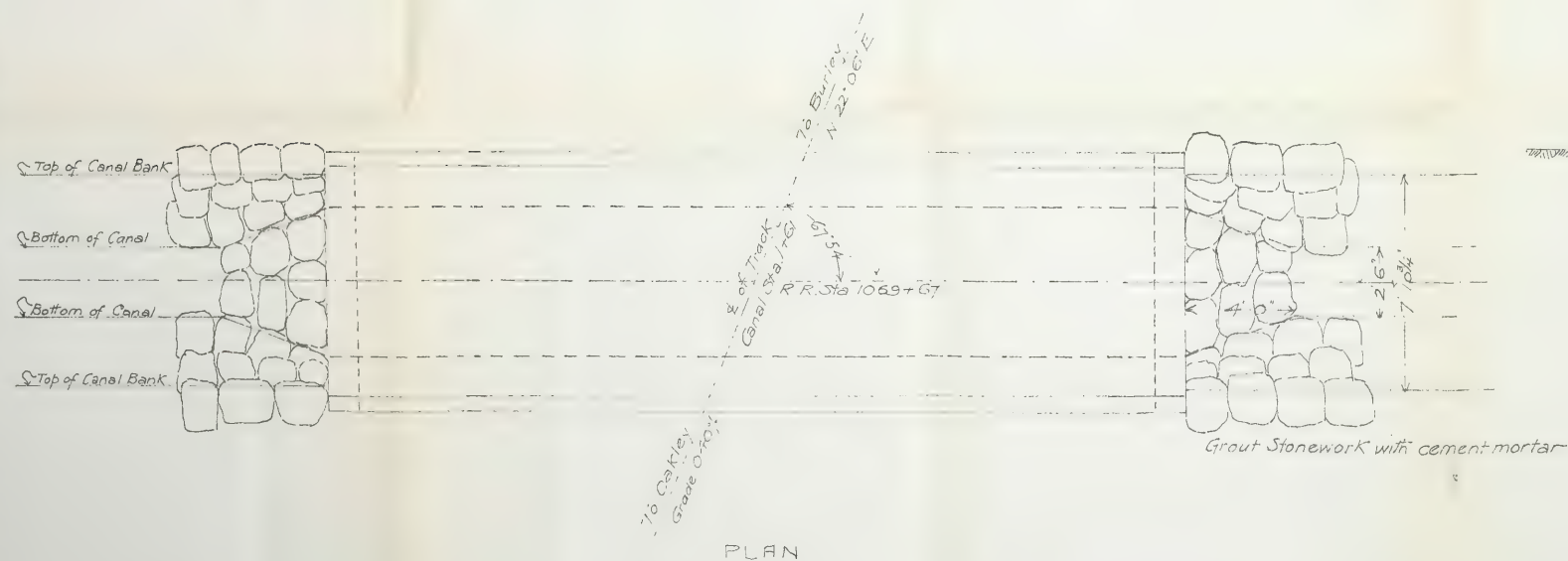
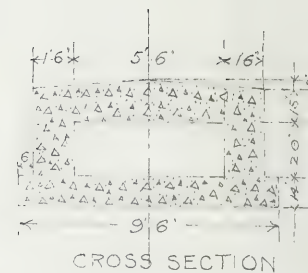
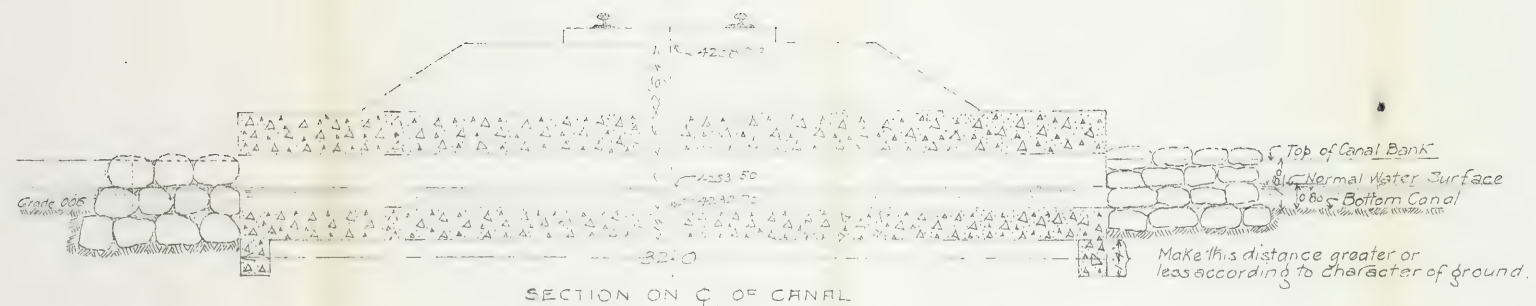
CHIEF ENGINEERS OFFICE, U.S. L.R.R. SALT LAKE CITY, UTAH, MAY, 1910

PLAN DRAWN FROM INFORMATION FURNISHED BY ASSISTANT ENGINEER R. B. ROBINSON

DRAWN BY L.E.Z., TRACED BY C.A.B., CHECKED BY E.A.P.

DRAWING NO. 14914
FILE NO. 1506 L.

34. Cu Vds. Concrete



MINIDOKA & SOUTHWESTERN RAILROAD
OAKLEY BRANCH

PLAN OF CONCRETE CULVERT 9'-6" x 2'

AT STATION 1069-67 FOR CANAL H 26 B

MINIDOKA PROJECT, U.S. RECLAMATION SERVICE

SCALE: $\frac{1}{4}$ " TO 1'

CHIEF ENGINEER'S OFFICE O. S. L. R. R. SALT LAKE CITY, UTAH. MAY, 1910

PLAN DRAWN FROM INFORMATION FURNISHED BY ASSISTANT ENGINEER R. B. ROBINSON.

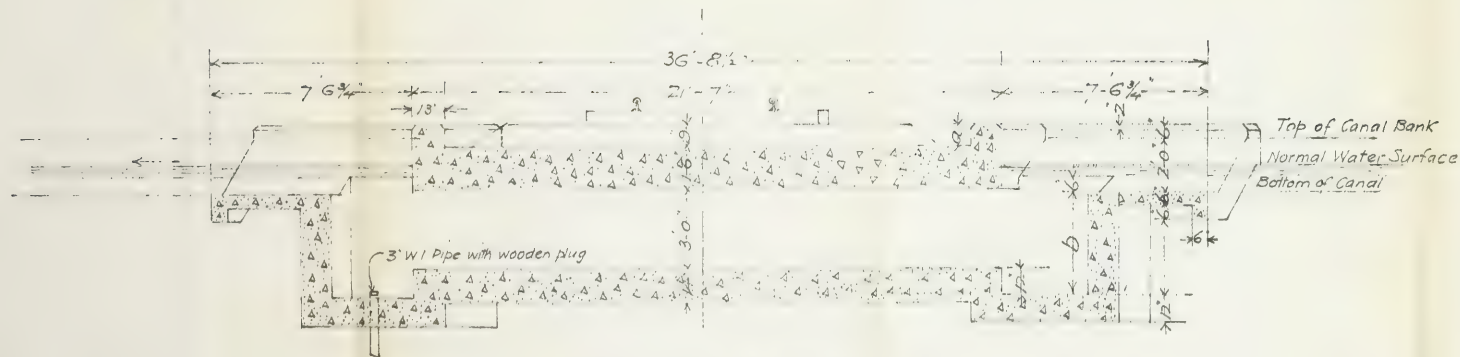
DRAWN BY L.F.Z. TRACED BY W.E.S. CHECKED BY E.A.P.

DRAWING NO. 14917
FILE NO. 1506 L

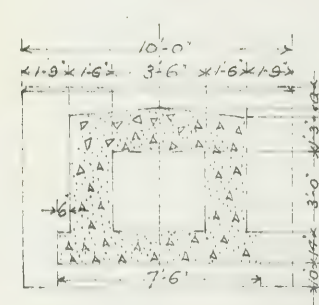
Oakley Branch

U.S. Cause No. 77.
PLFTS EX. A & B
Filed June 18-1910.
A.L. RICHARDSON,
Clerk.

Name of Canal	R.R. Station	Canal Sta.	Bottom of Canal	Water Surface	Top Canal Bank	Base of Tie	Grade Track	Grade of Canal	Dimensions
J32E	983+00	+78	4269.20	4269.20	4270.20	4270.06	-0.43%	0.04%	1'-4 3/4" x 4'-4 3/4" x 5'-4 3/4"
J32B	954+17	+12+17	4271.40	4272.40	4273.40	4273.85	-0.12%	0.04%	9'-3" x 9'-3" x 14'-9 3/4"
J32G	1040+50		4249.10	4250.10	4251.10	4250.71	-0.18%		1'-7 1/4" x 4'-7 1/4" x 5'-7 1/4"

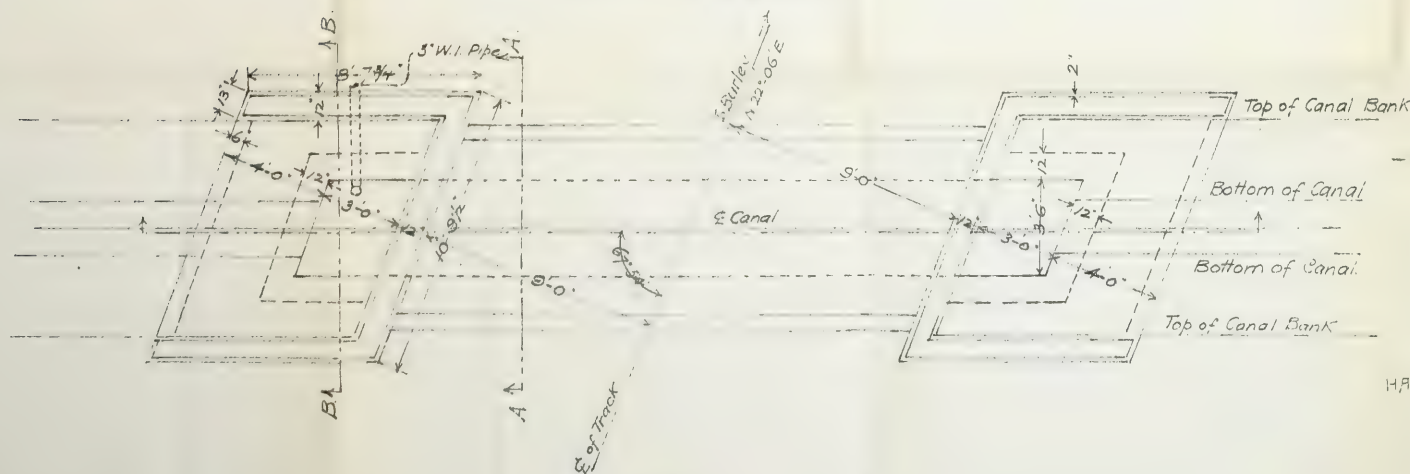


SECTION E OF CANAL

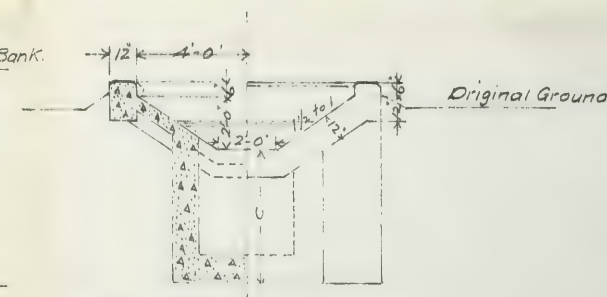


SECTION A-A

Name of Cu. Yds.	Canal	Concrete
J32E	35.9	
J32B	34.8	
J32G	36.2	



PLAN



HALF SECTION B-B. HALF END VIEW

MINIDOKA & SOUTHWESTERN RAILROAD
OAKLEY BRANCH
PLAN OF CONCRETE SYPHON 3'-6" x 3'
AT STATIONS 983+00, 954+17 & 1040+50
FOR CANALS J32E, J32B & J32G, RESPECTIVELY
MINIDOKA PROJECT, U.S. RECLAMATION SERVICE
SCALE: 1/4" TO 1'
CHIEF ENGINEER'S OFFICE, O.S.L.R.R., SALT LAKE CITY, UTAH, MAY, 1910
PLAN DRAWN FROM INFORMATION FURNISHED BY ASSISTANT ENGINEER R.B. ROBINSON
DRAWN BY L.E.Z. TRACED BY G.M.D. CHECKED BY E.A.B.

DRAWING NO. 14922
FILE NO. 1506 L.

Plaintiff's Exhibit "B."

(Copy).

Railroad Crossings.

Rupert, Idaho, June 10, 1910.

Mr. R. B. Robinson, Asst. Engineer,
Oregon Shortline Railroad Company,
Twin Falls, Idaho.

Dear Sir:—Replying to your letter of June 8, transmitting plans for openings for canal and lateral crossings, Okaley branch, M. & S. W. R. R., I wish to say that we have examined the plans for the three bridges shown on drawings Nos. 14915 and 14921, and see no objection to them, provided the channel bents are boxed in, in accordance with our verbal agreement, and provided also that full twelve inch clearance is left between the bottom of the stringer and the water surface at the crossing of Canal H. I believe that this change can easily be made, in fact, it is my understanding that the grade is already built to conform with this condition.

Regarding the other structures; we have not yet had time to review the plans, but will do so at the earliest possible date, when I will advise you of any changes which we may wish to suggest.

Very truly yours,

Project Engineer.

(Copy).

Railroad crossing. #1602.

Rupert, Idaho, June 13, 1910.

Mr. R. B. Robinson,

Asst. Engineer,

Oregon Short Line R. R.,

Twin Falls, Idaho.

Dear Sir: Referring further to your letter of June 8th and supplementing mine of June 10th regarding canal and lateral crossings, Oakley branch, will say that we have examined the plans which you have submitted and find them satisfactory with very few exceptions. The culvert for the J-30 crossing we would like to have made at least two feet high so that it can be more easily cleaned out, if necessary. We would like to request also that trash racks be provided at the upper and lower ends of each syphon. On the syphons which we are building, we are using for this purpose the very cheap and simple wooden rack with rails 4 or 6 inches apart. These are for the purpose of keeping tumble weeds and similar trash out of the syphon.

We find that many of the water ways could be reduced in area and still be satisfactory, and the following suggestions are made for your consideration, with the idea that they may be acted upon or not as you see fit:

For the H-26 opening, the width might be reduced from $4\frac{1}{2}$ to 4 feet, and the height from $4\frac{1}{2}$ to $3\frac{1}{2}$ /. For H-26-A, the width might be reduced from $3\frac{1}{2}$ to 3 and the height from $3\frac{1}{2}$ to $2\frac{1}{2}$. For H-26-B the width might be reduced from $5\frac{1}{2}$ to

41½/ For J-32-G the width might be reduced from 31½ to 21½, the height from 3 to 21½. For J-32-F the width might be reduced from 31½ to 3 and the height from 31½ to 21½. For J-32-Sta. 1003+37, the width might be reduced from 31½ to 21½ and the height from 3 to 21½. For J-32-E, the width might be reduced from 31½ to 21½, and the height from 3 to 21½. For J-32-B, the width might be reduced from 31½ to 21½ and the height from 3 to 21½. For J-32-Sta. 926+71, the width might be reduced from 6 to 5 ft.

In practically all cases of lateral crossings, where the angle of crossing is other than 90 degrees, I believe that if you desire the angle of skew can be reduced or entirely eliminated by changing the location of the lateral at the crossing. If this is done, the radius of curvature should be at least 6 or 7 times the surface width of water in the lateral.

If we were designing the structures, we should undoubtedly use much thinner sections, and re-enforced with steel. This, however, is simply a matter of preference.

I am returning the drawings herewith, as requested, and will ask you to send me a set of final plans for our files as soon as they have been definitely decided upon.

Very truly yours,

Project Engineer.

1 Copy to Supervising Engineer.

1 Copy of attached letter to Supervising Engineer.

Case No. 1930. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit "B." Received Dec. 27, 1910. F. D. Monckton, Clerk.

Defendants' Exhibit No. 1.

4—207 r.

M. L. 235083.

B.

M. F. H.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C.,

May 28, 1910.

I hereby certify that the annexed copies of papers are true and literal exemplifications of the originals in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal]

H. W. SANFORD,

Recorder of the General Land Office.

In Reply Please Refer to Carson City 04063 MN.
3 Inc.

M. L. 227119-1 F. B. D.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C.,

January 14, 1910.

Address Only the

Commissioner of the General Land Office.

MINIDOKA & SOUTHWESTERN R. R. CO.:

Recommending acceptance of amendment to articles of incorporation and submitting three maps for approval.

The Secretary of the Interior.

Sir: The Minidoka and Southwestern Railroad Company has filed certified copy of an amendment to its articles of incorporation authorizing the construction of a branch line of its railroad in Nevada. It has also filed three maps in connection with its application for right of way under the provisions of the act of March 3, 1875 (18 Stat., 482) for sections of such road. These papers and the maps have been examined and found to conform to the regulations and the township plats. The land affected by the proposed right of way is not within the limits of any Government reservation, nor does it appear to be valuable for power sites.

I recommend, therefore, that the amendment to the articles of incorporation be accepted for filing, and that the maps herewith submitted be approved, subject to all valid existing rights.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved Jan. 17, 1910.

FRANK PIERCE,
First Assistant Secretary. FWC.

M. L. 227119-2

State of Nevada,
Department of State,—ss.

I, W. G. Douglass, the duly elected, qualified and acting Secretary of State of the State of Nevada, do hereby certify that "Minidoka and Southwestern Railroad Company" a corporation organized under the laws of the State of Idaho, did, on the third day

of December, 1909, file in my office, in compliance with statutes governing foreign corporations doing business in this State, a copy of its Articles of Incorporation, duly authenticated by the Secretary of the State of Idaho.

Furthermore that the said Railroad Company has filed a duly authenticated statement of Officers and Directors and the name of a Resident Agent upon whom process can be served, thereby conforming to all requirements of law so far as pertains to this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of State, at my office, in Carson City, Nevada, this third day of December, A. D. 1909.

[Seal]

W. G. DOUGLASS,
Secretary of State.
By J. W. Legate,
Deputy.

1482-1904.

A. M.

L. & R. R. Div.

A. M.

DEPARTMENT OF THE INTERIOR,
Washington.

M. L. 227119-3

J.I.P.

April 4, 1904.

The Commissioner of the General Land Office.

Sir: Under cover of a letter of the 29th ultimo to the Department you enclosed a certified copy of the articles of incorporation and proofs of organization of the Minidoka and Southwestern Railroad

Company under the corporation laws of the State of Idaho.

You reported that the papers conform to the regulations and recommended that they be accepted for filing under the Act of March 3, 1875—18 Stat., 482.

The papers are in satisfactory form, are hereby accepted for filing as recommended, and are enclosed for that purpose.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

3-357

(4-560.)
60828.

From Interior Department.

Sec.

Dated April 4, 1904.

Returns accepted, certified copy of articles of incorporation and proofs of organization of the Minidoka and Southwestern Railroad Company under the laws of the State of Idaho.

R. ofw. files.

April 11/04.

HORHLING,
Advd.
J. McK.

M. L. 227119-4.

Referred to Div. F.

McKINNEY.
55-162.

M. L. 227119-5

95603

Certificate of Certified Copy

[Vignette]

STATE OF IDAHO,
DEPARTMENT OF STATE.

I, ROBERT LANSDON, Secretary of the State of Idaho, do hereby certify that the annexed is a full, true and complete transcript of Certified Copies of Articles of Incorporation and Amendments thereto of the MINIDOKA & SOUTHWESTERN RAILROAD COMPANY which was filed in this department on January 20, 1904, March 9, 1908 and November 13, 1908, respectively, ~~Which was filed in this office the~~ — day of — A. D. 1—, and admitted to record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State. Done at Boise City, the Capitol of Idaho, this fourteenth day of November, A. D. 1908.

[Seal]

ROBERT LANSDON,
Secretary of State.

1.

M. L. 227119-6

ARTICLES OF INCORPORATION
OF THE
MINIDOKA AND SOUTHWESTERN RAIL-
ROAD COMPANY.

State of Idaho,
County of Bannock,—ss.

We, the undersigned, one of whom is a resident of the State of Idaho, under and in pursuance of the

laws of said state, do hereby associate ourselves together for the purpose of creating a corporation with power to construct and own a railroad and franchise, as hereinafter provided, and do hereby agree to and adopt the following ARTICLES OF INCORPORATION.

Art. 1.

The name of this corporation shall be the "MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY."

Art. 2.

The purpose for which this corporation is organized is to construct, own, maintain, and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station, on the Oregon Short Line Railroad, in Section One (1) Township Eight (8) South, Range Twenty-five (25) East of Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) South, Range Thirteen (13) East of Boise Meridian, in Cassia County, in said State, a distance of eighty-

2.

M. L. 227119-7

five miles, more or less. The total estimated length of said railroad and telegraph line is eighty-five miles, and the same will be situated within the count-

ties of Lincoln and Cassia in said state.

Art. 3.

The principal place of business of said corporation shall be Pocatello, in Bannock County, State of Idaho.

Art. 4.

This corporation shall exist for the period of fifty years from the date of its incorporation.

Art. 5.

There shall be the following officers of this corporation, to-wit: Five directors, a president, vice-president, secretary and treasurer, and the following are the names and residences of the directors and other officers who are hereby appointed for the first year and until their successors are duly elected and qualified.

Names.	Residences.
E. E. Calvin,	Salt Lake City, Utah.
William Ashton,	Salt Lake City, Utah.
T. M. Schumacher,	Salt Lake City, Utah.
D. E. Burley,	Salt Lake City, Utah.
E. C. Manson,	Pocatello, Idaho.
Directors.	
E. E. Calvin,	President.
William Ashton,	Vice-President.
G. K. Smith,	Secretary.
C. H. Jenkinson,	Treasurer.

Art. 6.

The amount of the capital stock of this corporation

3.

M. L. 227119-8

shall be eight hundred and fifty thousand dollars

(\$850,000.00), which shall be divided into eight thousand five hundred (8500) shares of one hundred dollars (\$100.00) each.

Art. 7.

The amount of the capital stock of this corporation actually subscribed, names of subscribers and amount so subscribed are as follows, to wit:

E. E. Calvin, Trustee	\$93,000.00
E. E. Calvin	100.00
William Ashton	100.00
T. M. Schumacher	100.00
D. E. Burley	100.00
E. C. Manson	100.00
<hr/>	
	\$93,500.00

WITNESS the signatures of the undersigned incorporators this 18th day of January, 1904.

E. E. CALVIN.

WILLIAM ASHTON.

T. M. SCHUMACHER.

D. E. BURLEY.

E. C. MANSON.

4.

M. L. 227119-9

State of Utah,
County of Salt Lake,—ss.

On this 18th day of January, 1904, before me, Charles D. Savery, a notary public, personally appeared E. E. Calvin, William Ashton, T. M. Schumacher, and D. E. Burley, severally known to me to be the persons whose *name* are subscribed to the fore-

going articles of incorporation and who severally acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal] CHARLES D. SAVERY,
Notary Public.

My Commission expires Dec. 9th, 1904.

5.

M. L. 227119-10

State of Idaho,
County of Bannock,—ss.

On this 19th day of January, 1904, before me, J. J. Guheen, a notary public, personally appeared E. C. Manson, known to me to be one of the persons whose names are subscribed to the foregoing articles of incorporation and who acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal] J. J. GUHEEN,
Notary Public.

My Commission expires Oct. 4th, 1904.

6.

M. L. 227119-11

State of Utah,
County of Salt Lake,—ss.

I, E. E. Calvin, being duly sworn, on oath depose and say that I am the president of the Minidoka and Southwestern Railroad Company, a corporation

under the laws of the State of Idaho. I further state that the amount of the capital stock of the said corporation required by law has been actually subscribed, being the amount of one thousand dollars per mile for each mile of the proposed railroad, and one hundred dollars per mile for each mile of the said telegraph line, and amounting in the aggregate to ninety-three thousand five hundred dollars (\$93,500.00).

E. E. CALVIN.

Subscribed and sworn to before me this 18th day of January, 1904.

[Seal]

CHARLES D. SAVERY,
Notary Public.

My Commission expires Dec. 9, 1904.

M. L. 227119-12

[Endorsed]:

State of Idaho,
County of Bannock,—ss.

I, E. G. Gallet, Clerk of the District Court, Ex-Officio Auditor and Recorder of Bannock County, Idaho, do hereby certify that the within and foregoing is a full, true and correct copy of the original Articles of Incorporation of Minidoka and Southwestern Railroad Company as shown by the records of my office.

Witness my hand and official seal this 19th day of January, 1904.

[Seal]

E. G. GALLET,
Clerk District Court, Ex-Officio Auditor and Recorder.

By D. N. Campbell,
Deputy.

2930.

CERTIFIED COPY OF ARTICLES OF INCORPORATION AND PRESIDENT'S CERTIFICATE OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

DEPARTMENT OF STATE,

Secretary's Office.

Filed this 20th day of January, 1904, at 3 o'clock P. M.

WILL H. GIBSON,
Secretary of State.

M. L. 227119-13

CERTIFICATE OF AMENDMENT OF ARTICLE II OF THE ARTICLES OF INCORPORATION OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY, A CORPORATION OF THE STATE OF IDAHO.

We, G. H. Olmstead, Chairman, and G. K. Smith, Secretary of the special meeting of the stockholders of the Minidoka and Southwestern Railroad Company, held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company, at Pocatello, Bannock County, Idaho, at ten o'clock A. M. on the 28th day of February, 1908, for the purpose of amending Article II of the Articles of Incorporation of the said Company, and W. H. Bancroft, D. E. Burley, E. C. Manson, and William Ashton, members, and constituting a majority of the Board of Directors of said corporation, do hereby certify: That on the 12th day of February,

1908, by a majority vote of the Board of Directors of said Minidoka and Southwestern Railroad Company, a corporation, at a meeting of said Board, duly called and held, a resolution was passed, authorizing and directing a special meeting of the stockholders of said corporation to be held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company at Pocatello, Bannock County, Idaho, at ten o'clock A. M., on the 28th day of February, 1908, for the purpose of amending Article II of the Articles of Incorporation of the said Company. That notice of the time and place of holding said stockholders' meeting, and the object thereof, was published in the Pocatello Tribune, a newspaper published at Pocatello, Bannock County, Idaho, where the principal place of business of said Minidoka and Southwestern Railroad Company is situated, for a period of more than two weeks prior to the said 28th day of February, 1908, the day fixed for said meeting. That said notice also contained a statement of the nature of the amendment proposed to said Article II of the Articles of Incorporation of said company.

M. L. 227119-14

That at the time and place specified in said notice, said stockholders' meeting was held. That of the shares of stock of said corporation issued and outstanding, there was present and represented at said meeting 934 shares, being all of the said shares so issued and outstanding, except one, and at said meeting all of said shares so present and represented voted in favor of the proposed amendment of said

Article II, and there were no votes cast against such amendment. That more than two-thirds of the entire capital stock of said Minidoka and Southwestern Railroad Company, so subscribed, issued and outstanding, voted in favor of the said amendment. That said amended article, as adopted at said meeting, is in the language following, to-wit:

ARTICLE II.

The purpose for which this corporation is organized is to construct, own, maintain and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station on the Oregon Short Line Railroad in Section One (1) Township Eight (8), South, Range Twenty-five (25) East of Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) south of Range Thirteen (13) East of Boise Meridian in Cassia County, in said State, a distance of eighty-five miles more or less. Also a branch line of railroad and telegraph line beginning at Rupert station, on the line above described, in Lincoln County, in said State, and extending thence in a westerly direction, passing Jerome townsite, thence northwesterly passing Wendell townsite, and continuing thence northwesterly to a junction with the Oregon Short Line Railroad, at or near Fuller station, in said Lincoln

M. L. 227119-15

County, a distance of seventy miles, more or less. The total estimated length of said main and branch line and telegraph is one hundred and fifty-five miles, and the whole thereof will be situated within the counties of Lincoln, Cassia and Twin Falls, in said State.”

That G. H. Olmstead was Chairman of said stockholders’ meeting, and G. K. Smith, was the Secretary thereof. That the undersigned W. H. Bancroft, D. E. Burley, E. C. Manson and William Ashton, are members of the Board of Directors of the Minidoka and Southwestern Railroad Company, and constitute a majority of said Board, the entire board consisting of five members.

Dated at Pocatello, Bannock County, Idaho, this 28th day of February, 1908.

G. H. OLMSTEAD,
Chairman.

W. H. BANCROFT,
WILLIAM ASHTON,
D. E. BURLEY,
E. C. MANSON,
Directors.

[Seal] Attest: G. K. SMITH,
Secretary.

State of Utah,
County of Salt Lake,—ss.

On this 2nd day of March, 1908, before me, L. B. Swaner, a Notary Public, in and for said County and State, personally appeared W. H. Bancroft and William Ashton, severally known to me to be two of

the persons whose names are subscribed to the foregoing certificate of amendment of the articles of incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the State of Idaho, who severally acknowledged to me that he executed the same for the uses and purposes therein contained, and that he does not wish to retract such execution.

M. L. 227119-16

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

L. B. SWANER,
Notary Public.

State of Idaho,
County of Bannock,—ss.

On this 6th day of March, 1908, before me, John Bunting, a Notary Public in and for said county and State, personally appeared G. H. Olmstead, known to me to be a *bona fide* resident of the State of Idaho, and the person whose name is subscribed to the foregoing certificate of amendment of the articles of incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the said State, and acknowledged to me that he executed the same for the uses and purposes therein contained, and that he does not wish to retract such execution.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

JOHN BUNTING,
Notary Public.

[Endorsed]:

M. L. 227119-17

State of Idaho,
County of Bannock,—ss.

I, E. G. Gallet, Clerk of the District Court, Ex-Officio Auditor and Recorder of Bannock County, Idaho, do hereby certify that the within and foregoing is a full, true and correct copy of the original Certificate of Amendment of Articles of Incorporation as shown by the records of my office.

Witness my hand and official seal this 7th day of March, 1908.

[Seal] E. G. GALLET,
Clerk District Court, Ex-Officio Auditor and Recorder.

By _____,
Deputy.

2930.

CERTIFICATE OF AMENDMENT OF ARTICLE II OF THE ARTICLES OF INCORPORATION OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY A CORPORATION OF THE STATE OF IDAHO.

DEPARTMENT OF STATE,

Secretary's Office.

Filed this 9th day of March, 1908, at 10 o'clock A. M. and Recorded in Book "X" of Dom. Corp'ns on page 48.

Records of the State of Idaho.

ROBERT LANSDON,
Secretary of State.

M. L. 227119-18

CERTIFICATE OF AMENDMENT OF ARTICLE II OF THE ARTICLES OF INCORPORATION OF THE MINIDOKA & SOUTHWESTERN RAILROAD COMPANY, A CORPORATION OF THE STATE OF IDAHO.

We, W. H. Jones, Chairman, and G. K. Smith, Secretary of the special meeting of the stockholders of the Minidoka & Southwestern Railroad Company, held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company, at Pocatello, Bannock County, Idaho, at 10 o'clock A. M. on the 30th day of October, 1908, for the purpose of amending Article II of the Articles of Incorporation of the said company, and W. H. Bancroft, D. E. Burley, Wm. Ashton and J. M. Davis, members and constituting a majority of the board of directors of the said corporation do hereby certify that on the 13th day of October, 1908, by a majority vote of the board of directors of said Minidoka & Southwestern Railroad Company, a corporation, at a meeting of said board duly called and held, a resolution was passed authorizing and directing a special meeting of the stockholders of said corporation to be held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company, at Pocatello, Bannock County, Idaho, at 10 o'clock A. M., on the 30th day of October, 1908, for the purpose of considering and adopting an amendment to Article II of the Articles of Incorporation of the said company. That notice of the time and place of holding said stockholders' meeting and the

objects thereof was published at Pocatello, Bannock County, Idaho, where the principal place of business of said Minidoka & Southwestern Railroad Company is situated, for a period of two weeks prior to the said 30th day of October, 1908, the day fixed for said meeting.

That the said notice also contained a statement of the nature of the amendment proposed to said Article II of the Articles of Incorporation of said Company.

M. L. 227119-19

That at the time and place specified in said notice, said stockholders' meeting was held. That of the shares of stock of said corporation issued and outstanding there were present and represented at said meeting 849, being all of the said shares so issued and outstanding, except 1; and at said meeting all of said shares so present and represented voted in favor of the proposed amendment of the said Article II, and there were no votes cast against such amendment.

That more than two-thirds of the entire capital stock of the Minidoka and Southwestern Railroad Company so subscribed, issued and outstanding voted in favor of the said amendment. That said amended Article as adopted at said meeting is in the language following, to-wit:

“ARTICLE II.

“The purpose for which this corporation is organized is to construct, own, maintain and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed

desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station on the Oregon Short Line Railroad in Section One (1) Township Eight (8) South, Range Twenty-five (25) East of the Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) South of Range Thirteen (13) East of Boise Meridian, in Cassia County, in said State, a distance of eighty-five (85) miles more or less. Also a branch line of railroad and telegraph line beginning at Rupert station on the line above described, in Lin-

M. L. 227119-20

coln County, in said State, and extending thence in a westerly direction, passing Jerome townsite, thence northwesterly passing Wendell townsite, and continuing thence northwesterly to a junction with the Oregon Short Line Railroad, at or near Fuller station, in said Lincoln County, a distance of seventy (70) miles more or less.

Also a branch railroad line and telegraph line or extension of said railroad beginning at a point near Twin Falls station in Township Ten (10) South, Range Seventeen (17) East of the Boise Meridian, in Twin Falls County, State of Idaho, and extend-

ing thence in a southerly direction to a point on the state line between the states of Idaho and Nevada in the vicinity of range line between Ranges Fifteen (15) and Sixteen (16) East of the Boise Meridian in Twin Falls County, in said State, a distance of fifty-two (52) miles more or less; and thence continuing in a southerly direction along the Salmon River and Thousand Springs Summit to a connection with the Central Pacific Railway at a point between Moor and Valley Pass stations, in Elko County, State of Nevada, a distance of sixty-eight (68) miles more or less, and being a total length of one hundred twenty (120) miles more or less.

The total estimated length of said main and branch lines of railroad and telegraph lines is two hundred seventy-five (275) miles more or less, and the whole thereof will be situated within the counties of Lincoln, Cassia, and Twin Falls in the State of Idaho, and in Elko County in the State of Nevada.”

That W. H. Jones was Chairman of said stockholders’ meeting and G. K. Smith was the Secretary thereof.

That the undersigned, W. H. Bancroft, D. E. Burley, Wm. Ashton and J. M. Davis, are members of the Board of Directors of the Minidoka and South-

M. L. 227119-21

western Railroad Company and constitute a majority of said board, the entire board consisting of five (5) members.

Dated at Pocatello, Bannock County, Idaho, this 30th day of October, 1908.

W. H. JONES,

Chairman.

W. H. BANCROFT,

D. E. BURLEY,

WM. ASHTON,

J. M. DAVIS,

Directors.

Attest:

G. K. SMITH.

State of Utah,

County of Salt Lake,—ss.

On this 5th day of November, 1908, before me, L. B. Swaner, a notary public in and for said county and state, personally appeared W. H. Bancroft, D. E. Burley, Wm. Ashton, and J. M. Davis, severally known to me to be the persons whose names are subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation in the State of Idaho, who severally acknowledged to me that they executed the same for the uses and purposes therein contained;

IN WITNESS WHEREOF I hereunto set my hand and affix my official seal the day and year first above written.

[Seal]

L. B. SWANER,

Notary Public.

State of Idaho,
County of Bannock,—ss.

On this 7th day of November, 1908, before me, D. W. Church, a notary public in and for said county and state, personally appeared W. H. Jones, known to me to be a resident of said county and state and

M. L. 227119-22

the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the State of Idaho, who acknowledged to me that he executed the same for the uses and purposes therein contained.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

D. W. CHURCH,
Notary Public.

My Commission expires May 11th, 1912.

State of Utah,
County of Salt Lake,—ss.

I, G. K. Smith, being duly sworn, on oath depose and say that I am the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka & Southwestern Railroad Company, a corporation of the State of Idaho, as secretary of the meeting of the stockholders at which said amendment was adopted; and I further, on my oath, say that the said amendment, as signed, was duly adopted as therein

set forth by the stockholders of said company at said meeting.

G. K. SMITH.

Subscribed and sworn to this 5th day of November, 1908.

Witness my signature and official seal.

[Seal]

L. B. SWANER,
Notary Public.

State of Idaho,
County of Bannock,—ss.

I, W. H. Jones, being duly sworn, on oath, depose and say that I am the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka &
M. L. 227119-23

Southwestern Railroad Company, a corporation of the State of Idaho, as chairman.

I further state that I am a resident of said state and county, and that the said amendment, as set forth therein, was adopted by the vote of the stockholders of said company.

W. H. JONES.

Subscribed and sworn to this 7th day of November, 1908.

Witness my signature and official seal.

[Seal]

D. W. CHURCH,
Notary Public.

[Indorsement]: 12382. Filed for record at the request of D. W. Clark at 50 minutes past 2 o'clock

P. M., this 7th day of Nov., 1908. Records of Bannock County, State of Idaho.

E. G. GALLET,
Recorder.

State of Idaho,
Bannock County,—ss.

I, E. G. Gallet, Recorder in and for said county, do hereby certify that the within and foregoing is a full, true and correct copy of the original Certificate of Amendment of Article II of the Articles of Incorporation of the Minidoka & Southwestern Railroad Company, a Corporation of the State of Idaho, as the same appears of record and on file in my office.

WITNESS my hand and official seal at Pocatello, Idaho, this 9th day of November, 1908.

[Seal]

E. G. GALLET,
Recorder.

M. L. 227119-24

[Endorsed]:

AMENDMENT TO ARTICLE 2, MINIDOKA &
SOUTHWESTERN RAILROAD CO.

DEPARTMENT OF STATE,
Secretary's Office,

Filed this 13th day of November, 1908, at 10 o'clock A. M. and Recorded in Book Y of Dom. Corpns. on page —.

Records of the State of Idaho.

ROBERT LANSDON,
Secretary of State.

M. L. 227119

CERTIFICATE OF CERTIFIED COPY.

STATE OF IDAHO.

OFFICE OF THE SECRETARY OF STATE.

I, WILL H. GIBSON, Secretary of the State of Idaho, do hereby certify that the annexed is a full, true and complete transcript of

CERTIFIED COPY OF ARTICLES OF INCORPORATION OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

Which was filed in this office the 30th day of January, A. D. 1904, and admitted to record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State. Done at Boise City, the Capital of Idaho, this 20th day of January, A. D. 1904.

[Seal]

WILL H. GIBSON,
Secretary of State.

ARTICLES OF INCORPORATION
OF THE

MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

State of Idaho,
County of Bannock,—ss.

We, the undersigned, one of whom is a resident of the State of Idaho, under and in pursuance of the laws of the state, do hereby associate ourselves together for the purpose of creating a corporation with power to construct and own a railroad and franchise, as hereinafter provided, and do hereby agree to and adopt the following

ARTICLES OR INCORPORATION.

ART. 1.

The name of this corporation shall be the
“MINIDOKA AND SOUTHWESTERN RAIL-
ROAD COMPANY.”

ART. 2.

The purpose for which this corporation is organized is to construct, own, maintain, and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station, on the Oregon Short Line Railroad, in Section One (1) Township Eight (8) South, Range Twenty-Five (25) East of Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) South, Range Thirteen (13) East of Boise Meridian, in Cassia County, in said state, a distance of eighty-five miles, more or less. The total estimated length of said railroad and telegraph line is eighty-five miles, and the same will be situated within the counties of Lincoln and Cassia in said state.

ART. 3.

The principal place of business of said corporation shall be Pocatello, in Bannock County, State of Idaho.

ART. 4.

This corporation shall exist for the period of fifty years from the date of its incorporation.

ART. 5.

There shall be the following officers of this corporation, to wit: Five directors, a president, vice-president, secretary and treasurer, and the following are the names and residences of the directors and other officers who are hereby appointed for the first year and until their successors are duly elected and qualified.

Names.	Residences.
E. E. Calvin,	Salt Lake City, Utah,
William Ashton,	Salt Lake City, Utah,
T. M. Schumacher,	Salt Lake City, Utah,
D. E. Burley,	Salt Lake City, Utah,
E. C. Manson,	Pocatello, Idaho,

Directors.

E. E. Calvin,	President.
William Ashton,	Vice-president.
G. K. Smith,	Treasurer.
C. H. Jenkinson,	Secretary.

ART 6.

The amount of the capital stock of this corporation shall be eight hundred and fifty thousand dollars (\$850,000.00), which shall be divided into eight thousand five hundred (8500) shares of one hundred dollars (100.00) each.

ART. 7.

The amount of the capital stock of this corpora-

tion actually subscribed, names of subscribers and amount so subscribed, are as follows, to wit:

E. E. Calvin, Trustee.....	\$93,000.00
E. E. Calvin	100.00
William Ashton.....	100.00
T. M. Schumacher.....	100.00
D. E. Burley.....	100.00
E. C. Manson	100.00
<hr/>	
	\$93,500.00

WITNESS THE signatures of the undersigned incorporators this 18th day of January, 1904.

E. E. CALVIN.

WILLIAM ASHTON.

T. M. SCHUMACHER.

D. E. BURLEY.

E. C. MANSON.

State of Utah,

County of Salt Lake,—ss.

On this 18th day of January, 1904, before me, Charles D. Savery, a notary public, personally appeared E. E. Calvin, William Ashton, T. M. Schumacher, and D. E. Burley, severally known to me to be the persons whose *name* are subscribed to the foregoing articles of incorporation and who severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal]

CHARLES D. SAVERY,

Notary Public.

My Commission expires Dec. 9th, 1904.

State of Idaho,

County of Bannock,—ss.

On this 19th day of January, 1904, before me, J. J. Geheen, a notary public, personally appeared E. C. Manson, known to me to be one of the persons whose names are subscribed to the foregoing articles of incorporation and who acknowledged to me that he executed the same.

In witness whereof I have hereunto set my hand and official seal the day and year in this certificate above written.

[Seal]

J. J. GEHEEN,
Notary Public.

My Commission Expires Oct. 4th, 1904.

State of Idaho,

County of Bannock,—ss.

I, E. G. Gallet, Clerk of the District Court, Ex-officio Auditor and Recorder of Bannock County, Idaho, do hereby certify that the within and foregoing is a full, true and correct copy of the original Articles of Incorporation of Minidoka and Southwestern Railroad Company as shown by the records of my office.

Witness my hand and official seal this 19th day of January, 1904.

[Seal]

E. G. GALLET,
Clerk District Court, Ex-officio Auditor and Recorder.

By D. N. Campbell,
Deputy.

State of Utah,
County of Salt Lake,—ss.

I, E. E. Calvin, being duly sworn, on oath depose and say that I am the president of the Minidoka and Southwestern Railroad Company, a corporation under the laws of the State of Idaho. I further state that the amount of the capital stock of the said corporation required by law has been actually subscribed, being the amount of one thousand dollars per mile for each mile of proposed railroad, and one hundred dollars per mile for each mile of the said telegraph line, and amounting in the aggregate to ninety-three thousand five hundred dollars (\$93,500.00).

E. E. CALVIN.

Subscribed and sworn to before me this 18th day of January, 1904.

[Seal]

CHARLES D. SAVERY,
Notary Public.

My Commission expires Dec. 9, 1904.

[Endorsed]:

CERTIFIED COPY OF ARTICLES OF INCORPORATION AND PRESIDENT'S CERTIFICATE OF THE MINIDOKA AND SOUTHWESTERN RAILROAD COMPANY.

DEPARTMENT OF STATE,

Secretary's Office.

Filed this 20th Day of January, 1904, at 3 o'clock P. M.

WILL H. GIBSON,
Secretary of State.

M. L. 227119.

SECRETARY'S CERTIFICATE.

I, G. K. Smith, Secretary of the Minidoka and Southwestern Railroad Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State of Idaho, and that the copy of the articles of incorporation of the company filed with the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company this sixth day of February, 1904.

[Seal]

G. K. SMITH,
Secretary of the Minidoka and Southwestern Railroad Company.

State of Utah,
County of Salt Lake,—ss.

E. E. Calvin, being duly sworn, says, that he is the President of the Minidoka and Southwestern Railroad Company, and that the following is a true list of the officers of said company, with the full name and official designation of each, to wit:

E. E. Calvin,	of Salt Lake City, Utah,
William Ashton,	of Salt Lake City, Utah,
T. M. Schumacher,	of Salt Lake City, Utah,
D. E. Burley,	of Salt Lake City, Utah,
E. C. Manson,	of Pocatello, Idaho.

Directors.

E. E. Calvin, President.

William Ashton, Vice-president.

G. K. Smith, Secretary.

C. H. Jenkinson, Treasurer.

[Seal]

E. E. CALVIN.

Subscribed and sworn to before me this sixth day
of February, 1904.

[Seal]

CHAS. D. SAVERY,

Notary Public.

M. L. 227119.

CERTIFICATE OF INCORPORATION—
DOMESTIC CORPORATION.

STATE OF IDAHO.

OFFICE OF THE SECRETARY OF STATE.

I, Will H. Gibson, Secretary of State, of the State
of Idaho, do hereby certify that a certified copy of
the Articles of Incorporation of

MINIDOKA AND SOUTHWESTERN RAIL-
ROAD COMPANY,

duly certified by the Recorder of Bannock County, to
be a true copy of the original Articles, was filed in
this office on the 20th day of January, A. D., One
Thousand Nine Hundred and four, and is duly re-
corded in Book ——— Domestic Incorporations,
Records of the State of Idaho, which Articles con-
tained the statement of facts required by law, to wit:

First, The name of the Corporation as aforesaid;
Second, the purpose for which it was framed; Third,
The place where its principal business is to be trans-
acted; Fourth, The term for which it is to exist;
Fifth, the number of its directors, or its trustees,

and the names, residences and term of office of those who are appointed for the first year; Sixth, The amount of its capital stock and the number of shares into which it is divided; Seventh, The amount of its capital stock actually subscribed and by whom.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Idaho, Done at Boise City, the Capital, this 20th day of January in the year of our Lord One Thousand Nine Hundred and four and of the Independence of the United States of America the One Hundred and twenty-eighth.

[Seal]

WILL H. GIBSON,

Secretary of State.

Section 2086. Private corporations may be formed by the voluntary association of any five or more persons in the manner prescribed in this title. Provided one of such persons must be a *bona fide* resident of this State.

Section 2087. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

Section 2088. The instrument by which a private corporation is formed, is called "Articles of Incorporation."

Section 2089. Articles of incorporation must be prepared setting forth:

First. The name of the corporation.

Second. The purpose for which it is formed.

Third. The place where its principal business is to be transacted.

Fourth. The term for which it is to exist, not ex-

ceeding fifty years.

Fifth. The number of its directors or trustees; and the names and residences of those who are appointed for the first year; Provided, at any time during the existence of the corporation, the number of the directors may be increased, in corporations for profit, by a majority of the stockholders of the corporation, to any number not exceeding eleven, who must be members of the corporation, whereupon a certificate, stating the number of directors, must be filed, as provided for the filing of the original articles of incorporation.

Sixth. The amount of the capital stock, and the number of the shares into which it is divided.

Seventh. If there is a capital stock, the amount actually subscribed and by whom.

Section 2090. The articles of incorporation of any railroad, wagon road or telegraph organization must also state:

First. The kind of road or telegraph intended to be constructed.

Second. The place from and to which it is intended to be run, and all of the intermediate branches.

Third. The estimated length of the road or telegraph line.

Section 2091. The articles of incorporation must be subscribed by five or more persons, one or more of whom must be resident freeholders of this State, and acknowledged by each before some officer authorized to take and certify acknowledgments of conveyances of real property.

Section 2092. Each intended railroad, wagon road or telegraph corporation, before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amount, to wit:

First. One thousand dollars per mile of railroads.

Second. One hundred dollars per mile of telegraph lines.

Third. Three hundred dollars per mile of wagon roads.

Section 2093. Before the Secretary of State or the Recorder of the county issued to any such corporations a certificate of the filing of articles of incorporations, there must be filed in his office an affidavit of the president, Secretary or treasurer named in the articles that the amount of the capital stock thereof required by law has been actually subscribed.

Section 2094. Upon filing the articles of incorporation in the office of the County Recorder of the county in which the principal business of the company is to be transacted, and a copy thereof certified by the County Recorder, with the Secretary of State, and filing the affidavit mentioned in the last section, when such affidavit is required, the Secretary of State or such County Recorder must issue to the corporation, over his official seal, a certificate that a copy of the articles, containing the required statement of facts, has been filed in his office; and thereupon the persons executing the articles and their associates and successors shall be a body politic and corporate, by the name stated in the articles, and for

the term of fifty years, unless it is in the articles of incorporation otherwise stated, or by law otherwise specially provided.

CERTIFICATE.

DEPARTMENT OF STATE.

STATE OF IDAHO.

I, Will H. Gibson, Secretary of State of the State of Idaho, do hereby certify that the above and foregoing is a true and correct copy of Sections 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093 and 2094 of the Civil Code of the State of Idaho, 1901; I further certify that the foregoing was on January 20th, 1904, and still is all the Statute law of the State of Idaho touching upon the organization of domestic corporations; and that the articles of incorporation of the Minidoka and Southwestern Railroad Company have been filed according to law.

In Witness Whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State.

Done at Boise, the Capitol, this 9th day of February, in the year of our Lord one thousand nine hundred and four, and of the Independence of the

190 *The United States of America vs.*

United States of America the one hundred and
twenty-eighth.

[Seal]

WILL H. GIBSON,
Secretary of State.

PRD

37975

Advising MN.

In Reply Please Refer to 10-37975 "F" MN
MN.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE,

Washington, May 8, 1910.

M. L. 235083.

Address only the Commissioner of
the General Land Office.

MINIDOKA & SOUTHWESTERN R. R. CO.—

Recommending acceptance of amended articles
of incorporation.

The Secretary of the Interior.

Sir: Local counsel for the Minidoka and Southwestern Railroad Company has filed certified copy of amended articles of incorporation of said company under the provisions of the act of March 3, 1875. The certified copy of the original articles was accepted by you April 4, 1904. The amended articles have been examined and found to be in approved form. I recommend therefore that they be accepted for filing under the provisions of said act.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

The Minidoka & Southwestern R. R. Co. et al. 191

Approved May 18, 1910.

FRANK PIERCE,
First Assistant Secretary.

GHM

FWC

[Stamped]: Received May 19, 1910. G. L. O.

No Enc. H. F. C.

Received May 20, 1910.

Returned to _____.

Assigned to _____.

Answered by _____.

_____Noted _____.

File

5/ /10 To Horkling

CERTIFICATE OF CERTIFIED COPY.

M. L. 235083-2.

37975

[Vignette.]

STATE OF IDAHO,

DEPARTMENT OF STATE.

I, Robert Lansdon, Secretary of State of the State of Idaho, do hereby certify that the annexed is a full, true and complete transcript of certified copy of amended Articles of Incorporation of the

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY,

Which was filed in this office the Twenty-sixth day of July, A. D. 1909, and admitted to record.

In testimony whereof, I have hereunto set my hand and affixed the Great Seal of the State. Done

at Boise City, the Capital of Idaho, this Twenty-sixth day of July, A. D. 1909.

[Seal]

ROBERT LANSDON,

Secretary of State.

M. L. 235083-2.

CERTIFICATE OF AMENDMENT OF ARTICLE
II OF THE ARTICLES OF INCORPORATION
OF THE MINIDOKA & SOUTHWEST-
ERN RAILROAD COMPANY, A CORPORA-
TION OF THE STATE OF IDAHO.

We, W. H. Jones, Chairman, and C. K. Smith, Secretary, of the special meeting of the stockholders of the Minidoka & Southwestern Railroad Company, held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company at Pocatello, Bannock County, Idaho, at ten A. M. on the 12th day of July, 1909, for the purpose of amending Article II of the Articles of incorporation of said company and W. H. Bancroft, D. E. Burley, William Ashton and J. M. Davis, members and constituting a majority of the Board of Directors of said corporation, do hereby certify that on the 24th day of June, 1909, by a majority vote of the Board of Directors of said Minidoka & Southwestern Railroad Company, a corporation, at a meeting of said Board duly called and held, a resolution was passed authorizing and directing a special meeting of the stockholders of said corporation to be held at the office of the Superintendent of the Idaho Division of the Oregon Short Line Railroad Company at Pocatello, Bannock County, Idaho, at ten o'clock A. M. on the 12th day of July, 1909, for the

purpose of considering and adopting an amendment to article II of the articles of incorporation of the said company. That notice of the time and place of holding said stockholders' meeting and the objects thereof was published at Pocatello, Bannock County, Idaho, where the principal place of business of said Minidoka & Southwestern Railroad Company is situated, for a period of two weeks prior to said 12th day of July, 1909, the day fixed for said meeting. That the said notice also contained a statement of the nature of the amendment proposed to said article II of the articles of incorporation of said company.

That at the time and place specified in said notice said stockholders' meeting was held. That of the shares of stock of said corporation issued and outstanding there were present and represented at said

2.

M. L. 235083-3

meeting 849 shares, being all of the said shares so issued and outstanding except one; and at said meeting all of the said shares so present and represented voted in favor of the proposed amendment of said article II, and there were no votes cast against such amendment. That more than two-thirds of the entire capital stock of the Minidoka & Southwestern Railroad Company so subscribed, issued and outstanding voted in favor of the said amendment. That said amended article as adopted at said meeting is in the language following, to wit:

“ARTICLE II.

“The purpose for which this corporation is organized is to construct, own, maintain and operate a railroad and telegraph line with such branch lines and extensions as may from time to time be deemed desirable and as may be authorized by law. The said railroad and telegraph line is to begin at Minidoka station on the Oregon Short Line Railroad in Section One (1), Township Eight (8) South, Range Twenty-five (25), East of the Boise Meridian, in Lincoln County, State of Idaho, and extend thence in a general southwesterly direction to and across Snake River, thence in a general southwesterly direction to a point on Salmon River in the vicinity of the township line between Township Nine (9) and Ten (10) South of Range Thirteen (13) East of Boise Meridian, in Cassia County, in said State, a distance of eighty-five (85) miles more or less. Also a branch line of railroad and telegraph line beginning at Rupert station, on the line above described, in Lincoln County, in said State, and extending thence in a westerly direction, passing Jerome townsite, thence northwesterly passing Wendell townsite, and continuing thence northwesterly to a junction with the Oregon Short Line Railroad, at or near Fuller station, in said Lincoln County, a distance of seventy (70) miles more or less. Also a branch railroad line and telegraph line or extension of said railroad beginning at a point near Twin Falls station in Township Ten (10) South, Range seventeen (17) East of the Boise Meridian, in Twin Falls County, State of Idaho, and extending thence in a southerly direction to a point on the state line

between the station of Idaho and Nevada in the vicinity of range line between Ranges Fifteen (15) and Sixteen (16) East of the Boise Meridian, in Twin Falls County, in said State, a distance of fifty-two (52) miles more or less; and thence continuing in a southerly direction along the Salmon River and Thousand Springs Summit to a connection with the Central Pacific Railway at a point between Moor and Valley Pass stations, in Elko County, State of Nevada, a distance of sixty-eight (68) miles more or less, and being a total length of one hundred twenty (120) miles more or less. Also to construct, own, maintain and operate an extension of its main line of railroad from the end of its present operated main line near Buhl station in a westerly and north-westerly direction through Twin Falls, Owyhee and Canyon Counties, in the State of Idaho, to a point on the State line between the States of Idaho and Oregon, in or near Section 11, Township 4, North Range 6 West of the Boise Meridian, in said Canyon County, thence continuing in a *northly* direction to a connection with the present operated Oregon Short Line Railroad at or near Nyssa station, in Malheur County, Oregon, a distance of One Hundred Seventy Five (175) miles, more or less. Also a branch line from said main line, commencing at a point in or near Section 9, Township 10 South, Range 13 East of the Boise Meridian, in said Twin Falls County, and extending thence in a north-westerly direction through Twin Falls, Owyhee and Elmore Counties, in said State of Idaho, to a con-

3.

M. L. 235083-4

nection with the present operated Oregon Short Line Railroad at or near Glenn's Ferry station, a distance of Thirty-four (34) miles, more or less. Also a branch line of railroad commencing at a point on the present operated main line of said railroad at or near Burley station, in Section 20, Township 10 South, Range 23 East of the Boise Meridian, thence in a southerly direction to a point at or near the town of Oakley, in Township 14 South, Range 22 East of the Boise Meridian, a distance of Twenty-five (25) miles, more or less, and situated in Cassia County, in said State of Idaho, also to authorize the construction by the said company of telegraph and telephone lines along its main and branch lines and to authorize it to operate its trains upon all or any portion of its said lines by steam or electrical power, as it may from time to time determine. The total estimated length of said main and branch lines of said railroad and telegraph lines is five hundred (500) miles, more or less, and the whole thereof will be situated within the counties of Lincoln, Cassia, Twin Falls, Owyhee and Canyon, in the State of Idaho, in Elko County, in the State of Nevada and Malheur County, in the State of Oregon."

That W. H. Jones was Chairman of said stockholders' meeting and G. K. Smith was Secretary thereof.

That the undersigned, W. H. Bancroft, D. E. Burley, Wm. Ashton, and J. M. Davis, are members of the Board of Directors of the Minidoka and Southwestern Railroad Company and constitute a major-

ity of said board, the entire board consisting of five (5) members.

Dated at Pocatello, Bannock County, Idaho, this 12th day of July, 1909.

W. H. JONES,
Chairman.

W. H. BANCROFT,

D. E. BURLEY.

J. M. DAVIS,

WM. ASHTON.

Directors.

[Seal]

Attest: G. K. SMITH,
Secretary.

4.

M. L. 235083-5.

State of Utah,
County of Salt Lake,—ss.

On this 19th day of July, 1909, before me, L. B. Swaner, a notary public in and for said county and state, personally appeared W. H. Bancroft, D. E. Burley, Wm. Ashton, and J. M. Davis, severally known to me to be the persons whose names are subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation in the State of Idaho, who severally acknowledged to me that they executed the same for the uses and purposes therein contained.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

L. B. SWANER,
Notary Public.

State of Idaho,

County of Bannock,—ss.

On this 20th day of July, 1909, before me, D. W. Church, a notary public in and for said county and state, personally appeared W. H. Jones, known to me to be a resident of said ~~county~~ and state and the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the State of Idaho, who acknowledged to me that he executed the same for the uses and purposes therein contained.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

D. W. CHURCH,
Notary Public.

State of Utah,

County of Salt Lake,—ss.

I, G. K. Smith, being duly sworn, on oath depose and say that I am the person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka and Southwestern Railroad Company, a corporation of the State of Idaho, as Secretary of the meeting of the stockholders at which said amendment was adopted; and I further, on my oath, say that the said amendment, as signed, was duly adopted as therein set forth by the stockholders of said company at said meeting.

G. K. SMITH.

Subscribed and sworn to this 15th day of July, 1909. Witness my signature and official seal.

[Seal]

L. B. SWANER,
Notary Public.

5.

M. L. 235083-6.

State of Idaho,
County of Bannock,—ss.

I, W. H. Jones, being duly sworn, on oath, depose and say that I am the same person whose name is subscribed to the foregoing certificate of amendment of the Articles of Incorporation of the Minidoka & Southwestern Railroad Company, a corporation of the State of Idaho, as chairman. I further state that I am a resident of said state ~~and county~~, and that the said amendment, as set forth therein, was adopted by the vote of the stockholders of said company.

W. H. JONES.

Subscribed and sworn to this 20th day of July, 1909. Witness my signature and official seal.

[Seal]

D. W. CHURCH,
Notary Public.

[Endorsed]:

AMENDMENT TO ARTICLES INCORPORATION OF MINIDOKA & SOUTHWESTERN RAILROAD COMPANY.

DEPARTMENT OF STATE,

Secretary's Office.

Filed this 26 day of July, 1909, at 10 o'clock A. M.
and Recorded in Book Z of Dom. Corp'n. on page
— Records of the State of Idaho.

ROBERT LANSDON,
Secretary of State.

State of Idaho,
County of Bannock,—ss.

I, E. G. Gallett, recorder in and for said County hereby certify that the within and foregoing is a full, true and correct copy of the Original Certificate of Amendment of Article II of the Articles of Incorporation of the Minidoka and Southwestern Railway Company, as the same appears on file in my office, as filed this 20th day of July, 1909.

Witness my hand and official seal this 20th day of July, 1909.

[Seal]

E. G. GALLETT,
Recorder.

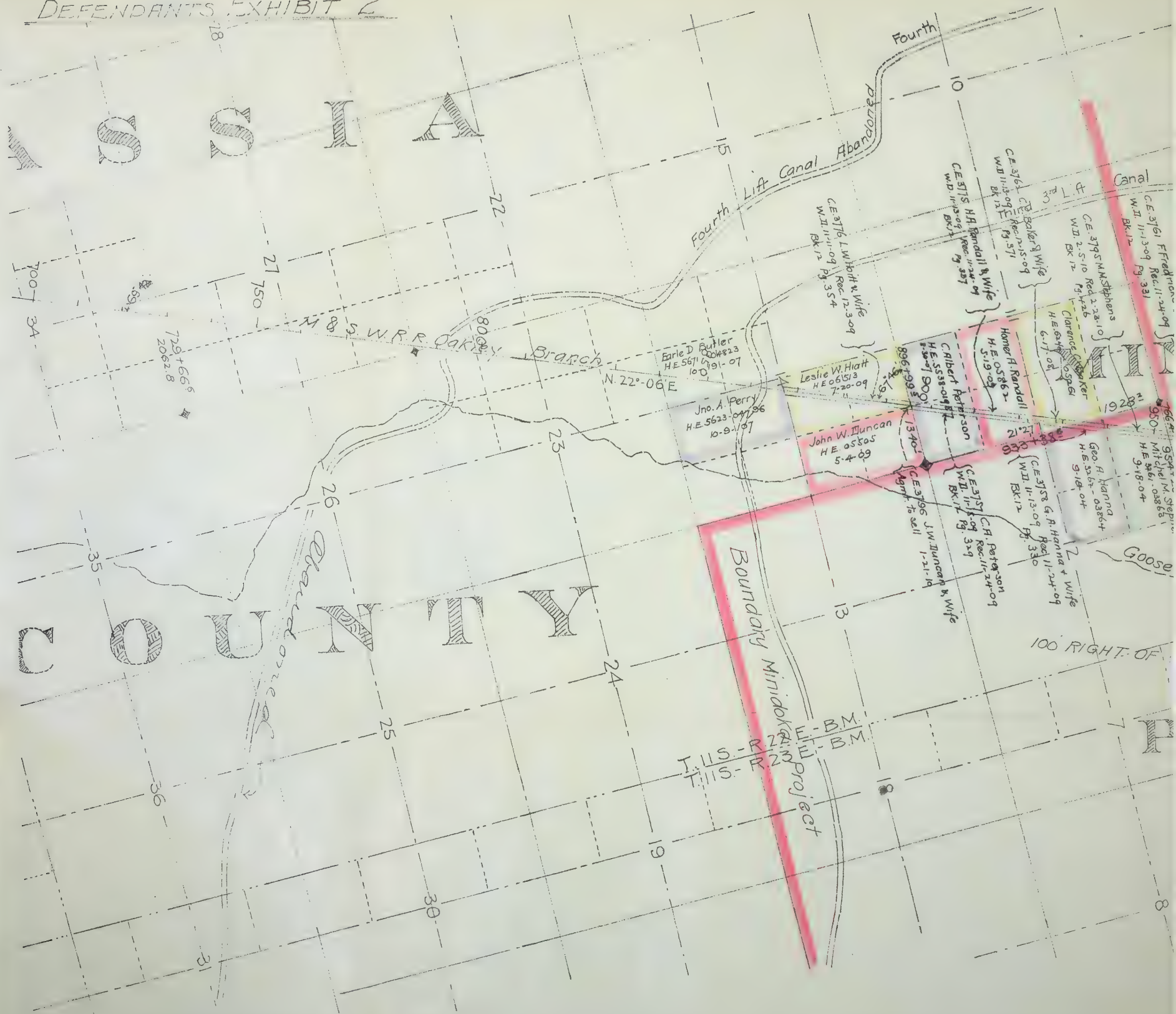
By W. A. Hyde,
Deputy.

M. L. 235083-7.

[Endorsed]: Defendants' Ex. 1. U. S. Cause No. 71. Filed June 18, 1910. A. L. Richardson, Clerk.

Case No. 1930. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendants' Exhibit "1." Received Dec. 27, 1910. F. D. Monckton, Clerk.

DEFENDANT'S EXHIBIT '2'



U. S. CAUSE NO. 71
FILED JUNE 18-1910.
A. L. RICHARDSON
Clerk.

Case No 1930
U. S. CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT,
DEFENDANTS EXHIBIT 2.
Received Dec 27, 1910
F. D. MONCKTON, Clerk.



No. 1930.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY and UTAH CONSTRUCTION
COMPANY,
Appellees.

Brief of Appellant.

*Upon Appeal from the United States Circuit Court for the
District of Idaho, Central Division.*

C. H. LINGENFELTER,
U. S. Attorney.

B. E. STOUTEMYER,
Attorneys for Appellant.

P. L. WILLIAMS,
D. WORTH CLARK,
Attorneys for Appellees.

FILED

FEB 9 - 1930

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

**MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY and UTAH CONSTRUCTION
COMPANY,**

Appellees.

Brief of Appellant.

*Upon Appeal from the United States Circuit Court for the
District of Idaho, Central Division.*

This case involves the interpretation of several acts of Congress under a condition of facts in regard to which there is no serious dispute. The principal facts have been agreed upon and stipulated into the record.

The stipulation contains about as concise a statement of these facts as it is possible to give and therefore they are given in the language of the stipulation. The principal points are the following:

Second. (Transcript, page 86)—That the complainant, the United States of America, operating under the provisions of the act of Congress of June 17, 1902 (32 Stat.

L., 388), has constructed and is now operating a certain irrigation project, in the State of Idaho, in the Counties of Lincoln and Cassia, consisting of a diversion dam across Snake River, a reservoir on Snake River and numerous canals, laterals, irrigation ditches and drainage ditches; also an electrical power plant and transmission line, by means of which water is pumped for the irrigation of the lands lying above the gravity canals, all of which said canals, laterals, ditches, transmission lines and irrigation works, including the various canals and laterals hereinafter referred to as being crossed or about to be by the defendant railroad company have been constructed under the authority of the United States, under the provisions of the act of Congress of June 17, 1902 (32 Stat. L., 388).

The Court: Hereinafter referred to?

Mr. Lingenfelter: That is, by the maps attached to the answer, I think.

The Court: Yes, but you are making a stipulation now of the facts.

Mr. Lingenfelter: The matters referred to are as follows: That the mains of the Government canals and laterals to be crossed by the proposed Burley to Oakley branch of the defendant's railroad are as follows, and were constructed on the dates written after each:

Canals and laterals crossed by the Burley-Oakley railroad:

C canal (1st lift), built March and April, 1908.

H canal (2nd lift), built April and May, 1908.

J canal (3rd lift), built May and June, 1908.

H 26 lateral, built June, 1909.

H 26B lateral, built June, 1909.

J 32 G, built September and October, 1909.

J 32 F, built September, October and November, 1909.

J 32 sta. 168, built September and October, 1909.

J 32 E lateral, built May, 1909.

J 32 B lateral, built June, 1909.

J 32 sta. 68, built May, 1909.

J 32, built October, 1909.

Third. (Transcript, page 89)—Under the canals and irrigation system of the complaint, as at present constructed, there is about 130,000 acres of irrigable land.

Fourth. That all the lands under said Minidoka project and the extension thereof are arid in character, and require irrigation to produce agricultural crops thereon, but are productive when irrigated.

Fifth. That the said Government ditches, canals and irrigation works, and the proposed extensions thereof, are the only means for the irrigation of said lands.

Sixth. That the lands, ditches and canals which are being crossed and which are to be crossed, and which are about to be crossed by the defendant's said railroad line from Burley to Oakley are a part of that section of said Minidoka Project which is known as the South Side Minidoka pumping project.

Seventh. That said South Side Minidoka pumping project is under construction and partly in operation, but additional canals, ditches, enlargements, alterations and extensions thereof are necessary for the irrigation of parts of said project.

Eighth. (Transcript, page 290)—That on November 17, 1902, the Secretary of the Interior, by his order dated November 17th, 1902, under the authority of Section 3 of the Act of June 17, 1902, (32 Stat. L. 388) withdrew from entry, except under the homestead law, certain lands be-

lieved to be susceptible of irrigation from said works, and ordered that all lands entered and entries made under the homestead law within the areas so withdrawn should be subject to all the provisions, limitations, charges, terms and conditions of said act of Congress of June 17, 1902, known as the Reclamation Act. Among other lands, the Secretary withdrew, under said withdrawal and order, the following described lands:

The southwest quarter of the southeast quarter of Section 19, Township 10 South, Range 23 East, Boise Meridian.

All of Section 30, Township 10 South, Range 23 East, Boise Meridian.

And the southeast quarter of the southeast quarter of Section 25, Township 10 South, Range 22 East, Boise Meridian.

And all of Sections 1, 11, 12 and 14, in Township 11 South, Range 22 East, Boise Meridian.

Ninth. That all of said above described lands were, at the date of said withdrawal, unentered, unoccupied public lands of the United States.

Tenth. That said order of withdrawal has not been rescinded, nor have said lands been restored nor freed from the conditions or restrictions of the Reclamation Act.

Eleventh. (Transcript, Page 91)—That after the withdrawal of said above described lands, as above set out, the said lands so withdrawn and restricted were entered by various persons under the homestead laws, subject to all the provisions, limitations, charges, terms and conditions of said Reclamation Act above referred to, but said entrymen have not yet made final proof or received patent or final certificate, neither have they yet repaid the United

States any part or installment of the cost of construction of said project.

Twelfth. That the lands shown upon the map attached to the defendant's answer herein as homestead entries are homestead entries made and held subject to the conditions, terms and charges and restrictions of the Reclamation Act.

Thirteenth. That after the withdrawal of the above described lands, as above set out, and the entry thereof by the several entrymen, the defendant railroad company went upon said lands and made surveys for a railroad line across the same from said town of Burley to said town of Oakley, both in Cassia County, Idaho, and has let contracts for the construction thereof, and that said railroad company and its said contractor, the Utah Construction Company, have gone upon said lands and partly constructed said railroad grade and railroad line, and is threatening to continue the same to completion, and will continue the same to completion unless restrained by the order of this Court.

Fourteenth. (Transcript, page 92)—That said railroad construction and threatened construction follows approximately the lines shown on the map attached to the defendant's answer herein.

Fifteenth. That said railroad construction and threatened construction consists of a railroad embankment upon which railroad ties and rails are to be laid, the borrow pits from which the earth is removed to form such embankment, and the grades, cuts and fills which are usual in railroad construction, and also several bridges across the several Government canals and laterals of the South Side Minidoka pumping project.

Sixteenth. (Transcript, page 93)—That said railroad line crosses three of the main canals of said South Side Minidoka pumping project, known as the first lift canal, the second lift canal and the third lift canal, as well as various laterals and smaller ditches.

Seventeenth. That under the provisions of said Reclamation Act of June 17, 1902, the complainant has expended in excess of \$1,300,000.00 in the construction of the irrigation works for the irrigation of the land lying under said South Side Minidoka pumping project, a portion of which is the land above described, which is now being taken possession of, excavated and thrown up into a railroad grade by said defendant railroad company.

Eighteenth. That no portion or installment of the cost of construction of said project has been returned or paid to the United States.

Nineteenth. That the said lands now being occupied and excavated by said railroad company as a railroad grade are in their natural condition well suited for irrigation and cultivation.

Twenty. (Transcript, page 94)—That by said excavation and the construction of said railroad grades, and the digging out of said borrow pits said lands now being occupied and graded into a railroad grade are rendered unsuitable and worthless for irrigation and agricultural purposes.

Twenty-one. That it is not practical to use for agricultural and irrigation purposes the lands so occupied by said railroad company during its said occupation and use thereof for railroad purposes, and that said lands could not be restored to a suitable condition for agricultural and irrigation purposes without considerable expense in

leveling down said railroad embankment and filling said borrow pits, which expense in many cases would be greater than the value of the land in question.

Twenty-two. That said defendant railroad company has surveyed its said railroad line on and across three irrigation canals constructed under the authority of the United States, under the provisions of the Reclamation Act of June 17, 1902, and that said defendant railroad company is threatening to and is about to go upon and across said irrigation canals and to construct its railroad line and bridges upon and across the same, as well as across several intervening Government laterals and smaller ditches.

Twenty-three. That said proposed railroad line will cross said Government's first lift canal at approximately the point shown on the map attached to the defendant's answer herein, in lot 3 of section 30, township 10 south, range 23 east, Boise meridian.

Twenty-four. That said proposed railroad line will cross said Government's second lift canal at approximately the point shown on the map attached to the defendant's answer herein, in the southeast quarter of the northeast quarter of section 36, township 10 south, range 22 east, Boise meridian.

Twenty-five. (Transcript, page 95)—That said proposed railroad line will cross said Government's third lift canal at approximately the point shown on the map attached to the defendant's answer herein, in the northwest quarter of the southeast quarter of section 14, township 11 south, range 22 east, Boise meridian.

Twenty-six. That the reclamation homestead entries

referred to above were made on the dates shown on the map attached to the defendant's answer herein.

Mr. Clark: (Transcript, page 96)—That is a matter I prefer to put in as a part of my case.

Mr. Lingenfelter: We will want you to show that; we don't object to who shows it in the record.

That the reclamation homestead entries referred to above were made on the dates shown on the map attached to the defendant's answer herein. That is your own showing.

Mr. Clark: That is the fact.

Mr. Stoutemyer: (Transcript, page 98)—That the railroad company is about to and will fence its proposed railroad on both sides down to the water's edge of the Government canals, and that it is necessary for the ditch riders and ditch tenders of the Government canal to pass up and down the bank of the canal at frequent intervals, and that in times of threatened break or leak in the canal it would be disastrous to the Government property if they were delayed or hindered in making such crossings and going up and down the banks of the canal to make necessary repairs and to distribute the water.

Is there any objections to that?

Mr. Clark: No, I think not.

I now offer in evidence Defendant's Exhibit No. 1 (Transcript, page 109), it being exemplifications or certified copies of papers filed in the office of the Secretary of the Interior by the Minidoka & Southwestern Railroad Company, showing compliance with the act of March 3, 1875, for the purpose of obtaining the benefit from that act over the lands in question for the purpose of a right of way. They show a letter signed, as I recollect it now,

by the Acting Secretary, Pierce, to the effect that they are in due form, and, as I understand, recommending them for approval. The position that we would take in that matter is that this certificate that they are in due form and in full compliance with the act would compel their approval by the Secretary of the Interior, that the law would give him no discretion, if they are in compliance.

Mr. Lingenfelter: The plaintiff objects to the introduction of Defendant's Exhibit 1, for the reason that no plan or profile of the route has been filed with the Secretary of the Interior, and for the further reason that the Secretary of the Interior has not approved the exhibits.

Mr. Clark: The last amendment, if the Court please, insofar as it has been passed upon by the Secretary of the Interior, is shown here.

The Court: These don't purport to show the profile?

Mr. Clark: No.

The Court: The objection is overruled.

Mr. Lingenfelter: Note an exception.

Mr. Clark: (Transcript, page 120)—I will say that Mr. Robinson just informs me that no conveyance, no actual conveyance, has been procured for the south half of section 14. He says that the man in possession of it made no objection, and it was the understanding that settlement would be made with him later, when they get together, that the men had that understanding. Now the only thing I could do, as I understand it, would be to bring some person here who knows that that understanding was had between those parties. I don't know but what you might agree that that was the fact upon Mr. Robinson's statement.

ARGUMENT.

The sequence of events is that the lands in question were withdrawn by the Secretary of the Interior for irrigation purposes on November 17, 1902, and thereafter the project was approved and the works actually constructed by the Government at a cost of over \$1,300,000.00, for the payment of which the land in question is bound, the Government retaining the title to the land until payment in full is made and retaining title to the works until further act of congress.

After the lands were withdrawn for this purpose and in many cases after the ditches and canals in question had been actually constructed by the Government, the lands were entered by reclamation homestead entrymen subject to all the terms and conditions of the Reclamation Act and at a still later date defendant railroad company has come upon the ground and has sought to appropriate to its own use a portion of the irrigable area of the project and to destroy the land in question for the agricultural and irrigation purposes for which it was withdrawn under the second form of the Reclamation Act.

The contention of the company is that it may appropriate and destroy such portion of the irrigable area of the Minidoka project as it may elect upon a mere showing that it has satisfied the demands of a part of the entrymen who are interested and is negotiating with others without having satisfied any of the demands of the Government nor reimbursed the Government for any part of its expenditure on account of this land, and that the Government has no remedy.

The Secretary of the Interior was unwilling to allow such an appropriation and destruction of a portion of the

project except upon certain conditions and stipulations which he considered necessary to the protection of the Government's interest in the project, and upon the refusal of the company to sign the stipulation the Secretary declined to approve the company's right-of-way profile and application under the act of March 3, 1875, and caused this action to be brought by the legal representatives of the Government to enjoin further depredations upon the Government property involved.

The Acts of Congress to be construed in this case are the following:

Sec. 2288 R. S.:

"Any bona fide settler under the pre-emption homestead, or other settlement law shall have the right to transfer *by warranty against his own acts*, any portion of *his* claim for church, cemetery or school purposes, or for right-of-way for railroads, telegraph, telephones, canals, reservoirs or ditches for irrigation or drainage across it, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to the claim."

And also in this connection the Act of Congress of June 17, 1902 (32 Stat. L. 388), commonly known as the Reclamation Act.

Section 1 of the Reclamation Act provides:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming, beginning with the fiscal year ending June 13th, 1901, including

the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the 5 per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act."

Section 2 of the Reclamation Act provides:

"That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction, as well as of those which have been completed."

Section 3 of the Reclamation Act provides:

"That the Secretary of the Interior, shall before giving the public notice provided for in Section 4 of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is here-

by authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this Act."

Section 4 of the Reclamation Act provides:

"That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project and limit of area per entry, which limit shall represent the acreage

which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon."

Section 5 of the Reclamation Act provides:

"That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in Section 4. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any land owner unless he be an actual bona fide resident on such land, or occupant thereof, residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any

moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act."

Section 6 of the Reclamation Act provides:

"That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for the protection and operation shall remain in the Government until otherwise provided by Congress."

Section 10 of the Reclamation Act provides:

"That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

32 Stat. L. 388.

Approved June 17, 1902.

And if the railroad company makes any serious pretension of having acquired any rights to the land in issue under the act of Congress of March 3, 1875, commonly known as the Railroad Right of Way Act, it may become necessary also to examine the provisions of that act, particularly:

“Sec. 5. That this act shall not apply to any lands within the limits of any cemetery, park, or Indian reservation, or other lands especially reserved from sale.”

For the sake of convenience our discussion of these various matters will be divided into four parts:

First. The railroad company has acquired no rights under the act of March 3, 1875.

(a) It appears that no plat or profile of the road has ever been either filed by the company or approved by the Secretary of the Interior as required by section 4 of that act from all parties desiring to secure the benefits of the act, and that the articles of incorporation and other papers have only been approved as to the regularity of the form.

(b) Even if the profile had been filed and approved no rights could have been acquired thereby by the railroad because the land had been previously segregated from the general body of the public domain by reason of the homestead filings and settlements thereon and was not subject to railroad appropriation under the act of 1875.

(c) Even if the profile had been filed and approved and the land had not been segregated by reason of the homestead entries, no rights could have been acquired by the railroad company under the act of 1875 because the land had been previously withdrawn under the second form authorized in the Reclamation Act for the accomplishment of a Government purpose authorized by law, and is excluded from railroad appropriation under the act of 1875 by section 5 of that act:

“Sec. 5. That this act shall not apply to any lands within the limits of any cemetery, park, or Indian reservation, or other land especially reserved from sale.”

Second. That the only title which the railroad company has acquired to the land in issue is a conveyance from a reclamation homestead entryman under an act of

Congress which authorizes a settler under the homestead law to transfer a portion of *his* claim *by warranty against his own acts*. It is obvious from the express provisions of this statute that it was not intended to extinguish the rights and title of the United States or to deny to the United States any appropriate action for the protection of its title and interest in the land. It was merely intended to provide a means by which a portion of the settlers' interest might be extinguished without voiding the entire claim.

Third. With respect to that portion of the withdrawn area which is located in the south half ($S\frac{1}{2}$) of section fourteen (14), township eleven (11) south, range twenty-two (22) east, we will urge the following objection in addition to those set out in part two: The statute authorizing the transfer of a portion of the settlers' interest, authorizes the transfer only in a particular way, that is, "by warranty against his own acts." It is admitted that no such conveyance has been received from the settlers in the south half of section 14, and, indeed, no conveyance at all. As to this tract of land the railroad company has no shadow of a title not even against the settlers, much less against the Government.

Fourth. The title of the Government to that portion of the withdrawn land occupied by its canals and ditches and the embankments and appurtenances thereof is an absolute fee simple title and with respect to this part of the land in issue the Government has the same absolute undivided right of possession and title which belongs to a private owner of a fee simple estate. Its title is not a mere easement. When it is shown that the Government's title to the land occupied by its canals is a title

in fee and that the land is reserved for a Government purpose authorized by law, it must be admitted that no railroad company has authority to take possession of such property and build fences and bridges and railroad grades and other structures thereon and occupy the property for a railroad line upon a mere showing that it does not intend to prevent the flow of the water in the ditches.

Part First, Division (A).

The language of Section 4 of the Act of 1875 is positive and unconditional in requiring the filing of the profile by all parties desiring to secure the benefits of the Act. It can not be assumed that Congress intended to make the law a laughing stock by giving to those who refuse or neglect to comply with its provisions the same rights as if they had complied. Moreover, it is only after the approval of the profile that such lands are disposed of subject to the right-of-way. The conclusion is obvious that before approval they are not subject to such right-of-way. This is a matter which is properly left to the discretion of the Secretary.

Oregon vs. Hitchcock, 202 U. S. 60.

Part First, Division (B).

That after homestead entry the land is excluded from railroad appropriation under the Act of 1875 has been settled by the Supreme Court of the United States and is not now open to controversy.

“The claim of a homestead or pre-emption entry made at any time before filing a map of definite location of a railroad prevents the lands covered by such claim from

passing to such railway under its land grant, even though such entry be subsequently abandoned."

Shiver vs. United States, 159 U. S. 491.

Under the Acts granting lands to aid in the construction of a line of railroad the claim of a homestead or pre-emption entry made at any time before the map was filed attached, within the meaning of those statutes; and no land to which such right had attached came within the grant.

Where homestead right had attached to the land before the railroad grant, it was excepted out of the grant as much as if it had been excluded therefrom by metes and bounds.

Sioux City & I. F. Co. vs. Griffey, 143 U. S. 32.

Kansas P. R. Co. vs. Dunmeyer, 113 U. S. 629.

Part First, Division (C).

Lands withdrawn under the second form of the Reclamation Act are "especially reserved from sale" and therefore belong to the classes of land which it has always been the policy and intention of Congress to preserve from appropriation and spoliation by railroad companies.

Two forms of withdrawal are authorized by Section 3 of the Reclamation Act. The first is for the purpose of preventing private parties from appropriating the sites which are necessary for the construction of the Government irrigation works. The second is for the purpose of preserving the irrigable area of the project without which the works would be useless and worthless and for the purpose of insuring the Government of full compliance with all the terms and conditions of the Reclamation Act. The second form of withdrawal is just as fully and clearly au-

thorized as the first and is equally necessary. Irrigation works, without irrigable lands, are just as worthless as irrigable lands without the necessary works.

It cannot be denied that such lands are withdrawn by express authority of law for a Government purpose fully authorized by law, namely, for irrigation and reclamation.

Lands withdrawn for any Government purpose have always been regarded as reserved from sale and from appropriation by railroad companies.

“An act of Congress granting land to a State in aid of railroad construction will not be considered as including lands theretofore legally appropriated for any purpose, although no reservation is made of it.”

Leavenworth L. & G. R. Co. vs. United States, 92 U. S. 733.

“Whenever a tract of land has been appropriated to the public use it is severed from the mass of the public domain, and subsequent laws of sale are not construed to embrace it, though they do not in terms except it.”

Wilcox vs. Jackson, 13 Pet. 498.

Lands which may be entered only under the homestead law particularly if it be the homestead law subject to the terms and conditions of the Reclamation Act, are not subject to “sale” but are “reserved from sale.” The only thing in connection with the ordinary homestead which in any way resembles a sale is the commutation privilege. This is not a part of the homestead law proper, but is a survival of the pre-emption law which has been engrafted upon the homestead law. But where the entry is a reclamation homestead entry the commutation privilege has

been entirely eliminated and the last vestage which could in any way be regarded as a sale, has disappeared.

It certainly will not be assumed that Congress used the word "sale" for no purpose at all or to convey a meaning different from and contrary to its common, well known and generally accepted meaning.

This is particularly true in view of the fact that at the time the act of 1875 was passed this term had been clearly and precisely defined by the Supreme Court of the United States in language which cannot be misunderstood.

The following is the language of the Supreme Court on this issue:

"We now proceed to the other points certified. Upon the first of them, relating to the premises having been parted with by Clarke to DeGrasse, upon a consideration other than cash, we remark, *that sale is a word of precise legal import both at law and in equity. It means at all times a contract between parties, to give and pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought and sold.* No departure from the manner in which a sale is directed to be made, either under a judgment at law or a decree in equity, is permitted."

Williamson vs. Berry, 8 How. 544.

An examination of the Public Land Statutes of the United States shows that Congress has uniformly used the term "sale" in its proper and generally accepted meaning as defined by the Supreme Court in the case of Williamson v. Berry, and always in connection with a transfer of title under the pre-emption law, the Timber and Stone Act, the desert law, the acts providing for the

sale of abandoned military reservations and isolated tracts and other acts authorizing the transfer of title upon payment of a purchase price. It is notable that where the term sale is used it always refers to a transfer of title in exchange for the payment of a purchase price. The term sale is always used in such cases.

But it is equally noticeable that the term sale is never used in those acts of Congress which authorize and regulate the entry of land under the homestead law, such entries not being regarded as sales but as a gift or bounty from the Government to the settler. This is particularly true of homesteads under the Reclamation Act, from which the commutation clause has been eliminated. The term sale is employed in each of the following acts and always in the sense described above:

In act of June 3, 1878, Ch. 151, 20 Stat. L. 89 (commonly called the Timber and Stone Act).

In act of March 3, 1877, Ch. 107 (19 Stat. L. 377), entitled "An act to provide for the sale of desert lands in certain States and territories."

Sec. 2353 R. S.; Sec. 2354 R. S.; Sec. 2355 R. S.; Sec. 2356 R. S.; Sec. 2357 R. S.

Sec. 2 of act of May 18, 1898, Ch. 344; Stat. L. 418; Sec. 2358 R. S.; Sec. 2359 R. S.; Sec. 2360 R. S.; Sec. 2365 R. S.; Sec. 2381 R. S.

In those acts authorizing and governing entries under the homestead law the term sale is never used, such entries not being considered sales.

Sec. 2289 R. S.; Sec. 2290 R. S.; Sec. 2291 R. S.

Act of June 17, 1902 (32 Stat. 388), Reclamation Act.

Section 2357, Revised Statutes, is particularly interesting, as it furnishes a convenient test for determining whether the lands withdrawn under the Reclamation Act are "offered for sale" or "reserved from sale."

It provides:

"The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold either at public or private sale for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale according to law and remain unsold at the close of such public sales shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry: *Provided*, That the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress shall be two dollars and fifty cents per acre."

We only need to ask, "Can the lands withdrawn under the second form of the Reclamation Act be purchased at the land office for one dollar and twenty-five cents an acre, or for two dollars and fifty cents per acre?"

Obviously they can not be purchased for that price or for any other price. They are not lands offered for sale, but are lands reserved from sale.

Lands Sold By Congress.

And finally, if any uncertainty ever existed as to what lands are regarded as lands sold by Congress, and what lands are lands reserved from sale, it has been removed by

the decision of the Supreme Court in the case of Iowa vs. McFarland, which is directly in point and unmistakable.

Act of March 3, 1845, c. 76, provided for the admission of the State of Iowa into the Union; and Act April 18, 1818, c. 67, authorizing the admission of Illinois. Both acts declare that 5 per cent of the net proceeds of land lying within the State, and afterwards "*sold by Congress*" shall be reserved and appropriated for certain public purposes of the State. Held that the words, "*Lands sold by Congress*" were limited to public land lying within the State, belonging to the United States, at the time of the admission of the States into the Union, which were actually sold by Congress for a pecuniary consideration, and did not include bounty lands or lands disposed of by the United States in satisfaction of military land warrants.

Iowa vs. McFarland, 110 U. S. 471, 28 L. Ed. 198.

"A homestead entry is the initial step taken in the land office toward acquiring ownership under the homestead law and precedes the performance on the part of a homestead claimant of the conditions of residence upon and improvement of land which constitutes the real consideration for the transfer of the title, and which are conditions precedent to the vesting of title in the homestead settler."

McCune vs. Essig, 118 Fed. 273, 277 (C. C. A. 122 Fed. 588).

"That portion which described the qualifications for entry is to be liberally construed, in order that no one be permitted to avail himself of *the bounty of Congress* (under the homestead laws) unless evidently of the classes Congress intended should enjoy that *bounty*."

Smith vs. Townsend, 148 U. S. 497.

“Now it is argued on the one hand that it is a matter of course for a court of equity to decree a specific performance of a contract for the conveyance of real estate, etc. On the other hand, it is contended *that the homestead is a gift from the Government to the homesteader, conditioned upon his occupation for five years, etc.*

We think the latter reasoning correct.”

Anderson vs. Carkins, 135 U. S. 488.

“The homestead is a gift from the Government to the homesteader.”

Adam vs. Church, 193 U. S. 515.

It is obvious that the lands withdrawn under the second form of the Reclamation Act are “specially reserved from sale” and belong to the class of lands which it has always been the policy and intention of Congress to preserve from appropriation and spoliation by railroad companies.

Second.

The only possible claim of title which the railroad company can assert to the land in issue is by reason of a deed from a reclamation-homestead entryman to a portion of his (the entryman's) claim by warranty against his (the entryman's) own acts.

It is admitted that prior to entry by the homesteaders and long prior to the initiation or assertion of any claims by the railroad company the lands were withdrawn by formal order of the Secretary of the Interior for a purpose expressly authorized by law, namely, for irrigation and reclamation as a part of a Government reclamation project.

“Whenever a tract of land has once been legally appropriated for any purpose from that moment it be-

comes severed from the mass of public lands, no subsequent law, proclamation or sale will be construed to embrace it or to operate upon it, although no reservation were made of it."

Wilcox vs. Jackson, 13 Pet. 498.

By reason of a conveyance under the following Act of Congress, to wit:

"Any bona fide settler under the pre-emption homestead or other settlement laws shall have the right to transfer *by warranty against his own acts*, any portion of *his* claim for church, cemetery or school purposes, or for right-of-way of railroads, telegraph, telephones, canals, reservoirs or ditches for irrigation or drainage across it, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to the claim."

The railroad company claims to have so far extinguished the Government title and interest that it may take possession of lands withdrawn by authority of law for the accomplishment of a particular Government purpose and entirely destroy their usefulness for the purpose for which they are withdrawn, and that the Government has no remedy either for the protection of its title and interest in the land or for the protection of the value of its irrigation works, which depend upon the preservation of the irrigable area.

Prior to the date of this act any conveyance by a homestead entryman prior to final certificate was considered a fraud on the Government, required perjury in connection with the final proof and therefore invalidated the entire entry. The intention of this Act was to provide a means by which the interest of the settler might be extinguished

in a portion of his entry upon an equitable payment to him of the value of his interest without invalidating the entire entry. It is obvious from the language of the statute itself that it was not intended to extinguish the title of the United States nor to destroy the right of the Government to protect its title and property interest by any appropriate action in court. This is true of the general homestead entry, but it is much more necessary and important in the case of the reclamation-homestead entry. In the case of the ordinary homestead entry, the necessity for the exercise of this power by the Government rarely, if ever, arises, but the fact that it is seldom exercised is no argument against the existence of the power. With respect to the reclamation-homestead entry the situation is entirely different. To hold in such a case that the Government has no standing in court merely because some entryman has given a deed to a portion of *his* (the entryman's) claim by warranty against his (the entryman's) own acts, not only deprives the Government of the power to protect its title and interest in the land but also deprives the Government of the power to protect the value of the irrigation works, in which the Government has invested about sixty million dollars (\$60,000,000.00) up to the present time, the preservation of the irrigable land being essential to the usefulness and value of the irrigation works. Prior to the railroad construction and prior to any of the entries in question, this land was withdrawn by a formal order of the Secretary of the Interior expressly authorized by law for the purpose among other things of insuring to the Government this very protection.

It is sought by construction to repeal the restrictive clause placed in the act by Congress, nullify the words,

“by warranty against his own acts” and the words *“any portion of his claim,”* and extend the act to include a conveyance not by warranty against the settler alone as provided in the act, but also a valid conveyance against the United States itself, even to the extent of including lands withdrawn for irrigation under the Reclamation Act subject to its charges and restrictions and entries for the irrigation of which the Government has spent many thousands of dollars, no part of which has been returned to the Government.

Under the decisions of the Supreme Court repeatedly affirmed in most emphatic language, it is impossible to extend such a statute by judicial construction or to give it any other construction except a strict construction against the grantee and in favor of the Government. It would be impossible to find more emphatic and unmis- takable language than has been used by the Supreme Court in reference to this rule of construction. This rule has been laid down by the Supreme Court of the United States in the case of *Mills vs. St. Claire Co.*, as the established doctrine of that Court in the following language:

“We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law should govern; only two general principles need be invoked in construing the acts of 1819 and 1821, which are: First. That in a grant like this, designed by the sovereign power, making it to be a general benefit and accommodation to the public, the rule is, that if the meaning of the words be doubtful they shall be taken most strongly against the grantee, and for the Government; and

therefore should not be extended by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed it must fall. Such is the established doctrine of this Court."

Mills vs. County of St. Clair, 8 How. 581, 12 L. Ed. 1201.

"Whether the grant be of property franchises or privileges, it is construed strictly in favor of the public; nothing passes but what is granted in clear and explicit terms."

Sutherland Stat. Const. 548, Holyoke Co. vs. Lyman, 15 Wall, 500, 21 L. Ed. 133.

"Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the Government rather than that of the individual."

Slidell vs. Grandjean, 111 U. S., 412, 28 L. Ed. 321.

"Any ambiguity in the terms must operate in favor of the Government."

Sutherland Stat. Const. 548;

Richmond R. R. Co. vs. Louisa. R. R., 13 How. 71, 14 L. Ed. 55;

Grant vs. Leach, 20 La. Ann., 329;

McLerd vs. Burrows, 9 Ga. 213;

Louisville R. R. vs. Kentucky, 161 U. S. 677, 40 L. Ed. 849.

"By a familiar rule every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the pub-

lic; because an intention on the part of the Government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, can not be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee, and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms."

Central Transportation Co. vs. Pullman Pal. Car Co. 139 U. S. 24, 35 L. Ed. 55.

"The words of a private grant are taken most strongly against the grantor. But this rule is reversed in cases of public grants. They are construed strictly in favor of the Government on grounds of public policy."

Lewis Sutherland Stat. Cons. par. 548;

Mills vs. St. Clair Co., 8 How. 581, 12 L. Ed. 1201;

Binghampton Bridge, 3 Wall. 51, 18 L. Ed. 137;

Green's Estate, 4 Md. Ch. 439;

United States vs. Arrendonio, 6 Pet. 738-9, 8 L. Ed. 547;

State ve. Bentley, 23 N. J. L. 532, 538.

Commonwealth vs. Roxbury, 9 Gray, 451, 492;

Slidell vs. Grandjean, 111 U. S. 412, 28 L. Ed. 321.

Hannibal R. R. Co. vs. Packet Co. 125 U. S. 260, 271.

Currier vs. Marietta R. R. 11 Ohio St. 228.

Mayor vs. Ohio, etc. R. R. 26 Pann. St. 355.

- San Francisco vs. Sharp, 125 Cal. 534, 58 Pac. 173.
 Burrows vs. Kimball, 11 Utah, 149, 41 Pac. 719.
 Clobe vs. Bellingham Co. 10 Wash. 458, 38 Pac. 1112.
 Central Transp. Co. vs. Pullman Co. 139 U. S. 24, 35 L. Ed. 55.
 Coosaw Co. vs. South Carolina, 144 U. S. 550, 36 L. Ed. 537.
 L. & N. R. R. vs. Kentucky, 161 U. S. 677, 40 L. Ed. 849.
 Wisconsin Central vs. United States, 164 U. S. 190, 41 L. Ed. 399.
 Long Island Co. vs. Brooklyn, 166 U. S. 685, 41 L. Ed. 1165.

By public notice issued by the Secretary of the Interior the estimated cost of the project is divided and assessed to the irrigable acreage of the project at so many dollars per acre for each acre of irrigable land. If all the irrigable area of the project is preserved, the returns at the rate fixed by public notice will just about make good to the Government its actual cost of construction, which is the intention of the law. But if any considerable part of the irrigable area of the project is destroyed, the Government will lost a part of its construction cost; by a recurrence of such events the fund will become depleted and the intention of the Act would be defeated.

If this company may appropriate one part of the Government project and destroy its usefulness for irrigation purposes, another and yet another may do likewise. Under the same law a private reservoir company may appropriate 10,000 acres of irrigable land in the heart of a constructed

Government project and by packing the soil with standing water and bringing the alkali to the surface may entirely destroy its agricultural value as a part of the Government project. Or if the Government project should happen to be a small one, practically the entire project might be destroyed in this way after the Government has made its investment. Whether the amount taken be large or small the legal principle is the same and the loss to the Government only differs in degree.

If the respondent's contention is correct, it would be held that the Government would have no remedy either to protect its title and interest in its withdrawn lands or to protect the value of its irrigation works even though the entire Government project were being destroyed.

The ridiculousness of this contention is further illustrated when it is considered what its effect would be if such a conveyance were made to a railroad company by a settler on unsurveyed land. This supposition is not at all imaginary for such conveyances are frequently made, and it is held that such settlers have the same rights against railroad companies and the same right to convey under the law for railroad purposes as has the homestead entryman, and the railroad company can not occupy any part of the land included in such a settlement without first extinguishing the right of the settler.

Yet such settlers have no right whatever against the Government if the land is required for Government purposes.

United States vs. Hanson, 167 Fed. 881, and cases there cited.

This case, recently decided by Your Honors, furnishes

a convenient illustration. If the respondent's contention is correct, all that Mr. Hanson needs to do to prevent the construction of the reservoir in issue in that case is to sell a portion of his claim to a railroad company "by warranty against his own acts." Then the railroad company, by purchase from one who has no title against the Government obtains a perfect title against the Government, and the reservoir can not be built because the cost of removing the railroad from the reservoir would be too great to permit the reservoir to be constructed at a reasonable cost.

The only argument advanced in support of the amazing construction of this law which is sought by the railroad company runs something like this:

Unless the railroad company is allowed to destroy the value of this withdrawn land for the purpose for which it is withdrawn, without let or hindrance, upon merely satisfying the demands of the settler, there is no law under which it can secure a perfect title to the desired right-of-way.

Therefore the protection of the Government's rights might, to some extent, conflict with the ambitions of the railroad company. Railroads are beneficial to railroad owners and sometimes to local communities, therefore, it must be the law that the Government has no rights where railroad companies are concerned.

We realize that our position on this question will be considered rank heresy, both by the railroad company and its attorneys, but we must respectfully insist that the Government's claims can not be thrown out of court upon a mere statement by a railroad attorney that the protection of the Government's rights might limit to some extent the ambitions of his company, and that in his opinion the great

railroad monopoly which he represents is a beneficent being that comes down from Heaven on snowy white wings to bestow upon all the people the benefits of "what the traffic will bear."

The argument is as false in fact as it is in law, for there is a clearly defined means fully authorized by express provisions of statute by which absolute titles may be obtained to the land in question free from any reservation whatever. The Secretary of the Interior is as fully authorized to restore the lands withdrawn under the Reclamation Act as he is to withdraw them in the first instance. Upon such restoration the lands would be immediately freed from all the restrictions of the Reclamation Act, patents could be promptly secured under the commutation clause and absolute titles conveyed to the railroad company. But the discretion of determining whether the public interests would best be served by restoring the land in question so that the railroad company may secure an absolute title or of retaining it for the purpose for which it is withdrawn, rests with the Secretary of the Interior, and not with the railroad company nor even with the trial court, and it is not within the province of either the company or the court to substitute its own opinion in regard to what would be the best public policy in regard to such matters, in place of the Secretary's opinion.

"Again it must be noticed that the legal title of all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under these circumstances it is not a province of the courts

to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. Courts may not anticipate its action or take upon themselves the administration of the land grants of the United States."

Oregon vs. Hitchcock, 202 U. S. 60.

Much less is it within the province of a railroad company or of a court to substitute its individual opinion in regard to the best public policy for the positive enactments of Congress expressed in plain and simple language.

There is nothing ambiguous or uncertain in the Act which authorizes a settler to transfer a portion of "*his claim*," "*by warranty against his own acts*," and the rule of law which governs its interpretation is equally plain and well settled.

"We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law should govern; only two general principles need be invoked in construing the Acts of 1819 and 1821, which are: First. That in a grant like this, designed by the sovereign power, making it to be a general benefit and accommodation to the public, the rule is, that if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the Government; and therefore should not be extended by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed it must fall. Such is the established doctrine of this Court."

Mills vs. County of St. Clair, 8 How. 581, 12 L. Ed. 1201.

“Public grants convey nothing by implication.”

United States vs. De la Maza Arrendondo, 6 Pet. 691.

This principle applies to grants in aid of railroads as well as all others. Any doubts as to the intention or extent of the grant or the intention of the Government are to be resolved in its favor.

Leavenworth L. & G. R. Co. vs. United States, 92 U. S. 733.

To give to this act the interpretation sought by the railroad company would not only require a very great extension “by implication in favor of the grantee, beyond the natural and obvious meaning of the words employed,” which is prohibited by the “established doctrine” of the Supreme Court, but it would in fact be necessary to repeal the entire law and to enact in its stead an entirely new and different one by judicial authority.

The argument that a conveyance from the settler by warranty against his own acts is a worthless instrument and the law of no effect unless it is extended to include the rights and title of the Government as well as those of the settler, is so weak that it collapses upon the first reading. It is obvious that it protects the company from the actions and complaints of the settlers and in ninety-nine cases out of a hundred that is all that is necessary, for under ordinary circumstances the Government does not object, but when the company seeks to take possession of land which has been withdrawn for the accomplishment of a particular Government purpose, such as irrigation and reclamation, and to so change the nature and condi-

tion of the land as to render it entirely unsuitable for that purpose, the reason for the objection is plain enough.

Third.

It is admitted that the railroad company has obtained no conveyance from the settlers in the south half ($S\frac{1}{2}$) of section fourteen (14), township eleven (11) south, range twenty-two (22) east.

The statute authorizes a settler to convey a portion of his claim only in a particular way. That is by warranty against his own acts. Not only has the company failed to obtain from the settler any conveyance by warranty against his own acts, but has entirely failed to obtain any conveyance of any nature or kind whatever. Consequently as to this tract of land, the company has no shadow of title whatever not even against the entryman, much less against the Government.

If it can be sustained that a party without any shadow of title can take possession of property belonging to another, appropriate it to his own use and change its condition and character to suit his own fancy, and that the owner of the legal title has no remedy to protect his property interests, then from that moment all rights of property have failed.

The principle involved in this part of the case is so elementary that it is very rarely that courts have been compelled to pass upon it, and when they have done so, they have not considered it necessary to argue the matter at any great length.

“I am of the opinion that the United States is entitled to its injunction mandatory as to so much of the fence complained of as exists, and prohibitory as

to building any future fences, so far as either of them comes within the following principles: (1) There exists no right in the defendants to build and fence on the lands of the United States. (2) All lands are for this purpose, lands of the United States, so long as the legal title remains in the United States. (3) It is the right of the United States and its duty to protect all such lands from this misuse in cases where there have been any kind of entries, whether of pre-emption, homestead, or private entry, though the purchase money be paid, so long as the legal title remains in the United States, except where those latter parties build their own fences or give express license to others to do it. In these cases it holds the title in trust and can maintain this bill to remove the fence or prevent its erection. A decree should be entered based on these principles."

United States vs. Brighton Ranch Co. 25 Fed.
465.

The question was also discussed by Justice Brewer in a very able opinion rendered by him while on the Circuit bench in a case of the same name:

"We think, too, an action of injunction is the appropriate remedy, and that an action of ejection would not furnish full protection to the Government. Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction; and in this case it was not the mere fact that the fence is built upon Government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also to separate the enclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a Court of Equity, which

reaches the individual and compels him to abandon and desist from any encroachment on the public property."

U. S. vs. Brighton Ranch Co. 26 Fed. 218.

Fourth.

When it is shown that the Government's title to that part of the withdrawn land occupied by the canals and laterals involved in this suit, and their embankments and appurtenances, is an absolute fee simple title, it must be conceded that no railroad company may take violent possession thereof and occupy the same for its own purposes and build fences, railroad grades, bridges and other structures thereon upon a mere showing that it does not intend to obstruct the flow of the water in the ditches. Under the provisions of the act of Congress of August 30, 1890 (26 Stat. L. 391), a right of way is reserved for ditches and canals constructed under the authority of the United States. The provision in question is as follows:

"That in all patents for lands hereafter taken up under any of the land laws of the United States or entries or claims validated by this act west of the one-hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereof for ditches or canals constructed by the authority of the United States."

Act of Congress of August 30, 1890 (26 Stat. L. 391).

Green vs. Willhite, 14 Idaho 238, 93 Pac. 971.

Green vs. Willhite, 160 Fed. 755.

There has been considerable argument and some difference of opinion as to whether the right reserved to the Government by this act is a fee or an easement. Undoubt-

edly there are some very strong reasons for believing that it is at least a conditional fee.

That the right of way preserved to the Government for ditches and canals constructed under its authority is a fee title appears from the construction given to the same term in other acts of Congress. Exactly the same term is used in the act of August 30, 1890, (26 Stat. L. 391) with respect to the right reserved to the Government for canals constructed by it as is used in the act of March 3, 1875, with reference to the title to be conveyed to railroad companies for their construction:

“Sec. 1, act of March 3, 1875, (18 Stat. L. 482). That the *right of way* through the public lands of the United States is hereby granted, etc.”

“Act of August 30, 1890, (26 Stat. L. 391). There is reserved from the lands in said patent described, a *right of way* thereon for ditches or canals constructed by the authority of the United States.”

The term in each case is right of way. In the case of the Northern Pacific Railroad Company vs. Townsend, 190 U. S. 267, the Supreme Court has held that the right conveyed by this expression is a conditional fee on an implied condition of reverter in the event that the Company ceased to use or retain the land for the purpose for which it was granted. Under the well known rule of construction that all ambiguities in such statutes are to be determined in favor of the Government and against the grantee and that such grants are to be strictly construed against the grantee and reservations therein liberally construed in favor of the Government, the right reserved to the Government by the description *right of way* for ditches or canals constructed by the authority of the United States can not be held to reserve to the United States any less

right than is conveyed to the railroad company by the same descriptive words in the act of March 3, 1875. In other words, the title of the Government to such rights of way certainly can not be held to be anything less than a conditional fee but may and probably is to be held to be something more or better than that. It is certainly a stronger title in this respect, that it is not subject to forfeiture by non-use, as is the title conveyed to the railroad company under the Railroad Act.

But in this case it is not necessary for the Government to rely on any point about which there can be any reasonable difference of opinion and therefore for the purpose of this argument we are willing to concede that the right of way reserved by the act of August 30, 1890, is an easement as urged by our opponents and to proceed with the argument on that issue.

You may consider the Government's rights under the act of August 30, 1890, as an easement, or, if you like, may disregard the Government's rights under that act altogether, and the Government still has a fee simple estate.

All of the land occupied by the Government ditches was occupied and used by the Government and the ditches and canals actually constructed by the Government long prior to the construction of the railroad line, and in a number of cases the land occupied by the Government ditches was occupied and used by the Government prior to the entry of the settler from whom the railroad company claims title.

Such actual occupation and use by the Government preserves the original Government title to the Government just as effectively as if the land had been withdrawn under the first form of the Reclamation Act, or for an Indian,

or military reservation, or any other purpose authorized by law.

For example, take the first lift main canal, some times referred to as "C canal." The stipulation in regard to this canal is that it was built under the authority of the United States under the provisions of the act of Congress of June 17, 1902, (32 Stat. L. 388) during March and April, 1908, (see paragraph 2 of the stipulation) and that the reclamation homestead entries referred to were made on the dates shown on the map attached to the defendant's answer herein (see paragraph 28 of the stipulation). The map in question shows with respect to the entry of this tract that it was made by Edward R. Guyman, homestead entry No. 03106 on July 12, 1909, and at a still later date he conveyed a right of way to the railroad company. In this case the settler's entry was made over a year after the land occupied by the canal had been actually appropriated and occupied by the Government and the canal actually constructed.

That the original Government title is a fee simple title requires no argument; it is in fact the origin of all fee simple titles in this country, and so far as the first lift canal is concerned, it is evident that the original title has been preserved.

"Now, that the land in question has been appropriated in point of fact, there can be no doubt for the case agreed states that it had been *used* from the year 1804 until and after the institution of this suit, as well for the purpose of a military post as for that of an Indian agency with some occasional interruption. *Now this is appropriation for that is nothing more or less than setting apart the thing for some particular use.*"

Wilcox vs. Jackson, 13 Peters 498, 512.

Scott vs. Carew, 196 U. S. 100.

It is clear that power to withdraw lands from entry was granted to the Secretary of the Interior in order to prevent appropriation by private citizens *in advance* of the actual occupation and use by the United States, but that the Government is not precluded, irrespective of an order of withdrawal from appropriating the land by actual taking of possession.

The same rule has guided the decisions of the Land Office.

In re Davis, 5 L. D. 376.

"Lands segregated by military occupation. Wilson Davis. The establishment and occupancy of a cantonment by the military authorities, excludes from entry, prior to the formal order of reservation, the land thus appropriated. Acting Secretary Muldrow to Commissioner Sparks, January 20, 1887.

"I have considered the appeal of Wilson Davis from the decision of your office, dated July 25, 1885, holding for cancellation his pre-emption cash entry No. 105 of the $W\frac{1}{2}$ of the $NW\frac{1}{4}$ and the $N\frac{1}{2}$ of the $SW\frac{1}{4}$ of Section 6, Township 47 North, Range 8 West, N. M. Meridian, made October 2, 1883, at the Gunnison Land Office, in the State of Colorado, so far as the same conflicts with the military reserve, as shown by the supplemental township plat approved July 15, 1884.

"The facts appear to be substantially set forth in the decision appealed from, and it is shown that the land in controversy was within the limits of the Ute Indian reservation, formerly occupied by the White River and Uncompahgre Ute Indians in Colorado, which was declared to be public land of the United States and subject to disposal for cash under existing

laws, by act of Congress approved July 28, 1882, (22 Stat. 178).

“It appears that the township plat of survey embracing said land was filed on March 23, 1883; that Davis filed his pre-emption declaratory statement for said tracts on July 9, 1883, alleging settlement March 27, 1882, and cash certificate was issued upon his final proof on October 2, 1883. It further appears from the statement in said decision and from an inspection of the records of your office that the land in controversy was occupied by the United States military authorities in 1804 as a cantonment.

“In response to an inquiry from your office, the Secretary of War, on November 18, 1882, transmitted the report of the Judge Advocate General relative to the status of the land within the late Uncompahgre reservation, reported as having been laid off by the military authorities in the Uncompahgre Valley and called the cantonment, in which it was held that by virtue of the treaties made by and between the United States and the Indians, dated October 7, 1863, (13 Stat. 673) March 2, 1868, (15 Stat. 619) and September 18, 1873, said cantonment was properly located on said Indian reservation; that, although the reservation for the cantonment was not in fact declared by the President, yet the land was in good faith legally appropriated, and therefore segregated from the public domain, and that said cantonment should be considered a military reservation, and the land embraced therein should not be considered subject to disposal as other public lands under said act.

“The Secretary of War concurred in the views expressed by the Judge Advocate General. Your office held that the establishment of said cantonment and the occupation thereof by the military authorities, acting under the authority of the Commander in Chief,

the President, must be regarded as legal, and that the reservation must be considered as established by law, so as to exempt the lands embraced therein from entry under the pre-emption laws.

"It is urged that the formal order of the President, declaring said reservation, was not made until after Davis had made his said entry, but that can make no difference, if the land embraced in said entry was in fact included in said cantonment, and the same had been established by law and was in the actual occupation of the military authorities at the time of his said entry, the entry must be considered illegal, so far as it covers land within the limits of the cantonment.

"A careful examination of the record discloses no good reason for disturbing said decision, and it is accordingly affirmed."

In re Davis, 5 L. D. 376.

To the same effect is—

Mather vs. Hackley's Heirs, 19 L. D. 48, 52.

"By the terms of the proviso of the act of March 12, 1860, extending the provisions of the swamp land grant to the State of Minnesota, said grant is not operative as to any lands that prior to selection by the State have been reserved, sold or disposed of pursuant to any law enacted prior to said act."

"It is not necessary to constitute an Indian reservation that a treaty or act of Congress shall specifically describe the lands that are reserved. It is sufficient for such purpose if the lands occupied by the Indians are recognized by the officials of the Government as reserved Indian lands."

In re State of Minnesota, 22 L. D. 388.

"Lands which for a long period of time have been with the knowledge and acquiescence of the Govern-

ment included in the site of a reservoir used as a feeder of a canal in the maintenance and operation of which the Government is interested are not 'unappropriated public lands' and are therefore not subject to the homestead entry."

In re Longnecker, 30 L. D. 186.

To the same effect is—

In re Longnecker (on review) 30 L. D. 611.

And to the same effect is a very recent case—

In re Northern Pacific Railroad, 38 L. D. 496.

The public lands actually occupied and used by the Government as an irrigation canal constructed and operated under the provisions of the Reclamation Act are appropriated by the Government, are not unappropriated public land and are therefore not subject to homestead entry nor to subsequent appropriation by a railroad company. The land is as fully reserved by the actual occupation and use of the Government as it would be if withdrawn under the first form of the Reclamation Act or under any other act for any Government purpose.

And the retention in the Government of the title to the works constructed under the Reclamation Act is expressly directed by that act:

"That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provision of this act: *Provided*, That when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the

lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress."

Sec. 6, Reclamation Act.

Until otherwise provided by Congress, the only thing which can pass from the Government under any conditions, is the management and operation of the irrigation works and that only after the payments for the major portion of the lands have been made. On this project it is agreed that no part of the cost of construction has been paid. So the Government retains the management and control of all the works as well as the title thereto and will do so for a long time to come.

It is plain that, so far at least as the first lift main canal is concerned, the Government has retained its original fee simple estate and by actual occupation and use for a purpose authorized by law has reserved it from appropriation by individuals or corporations.

The action of the railroad company in taking possession of this land and constructing bridges and fences and railroad grades and other structures thereon is a continuing trespass which can not be excused by the mere statement that the company does not intend to obstruct the flow of the water in the canal.

The Government is entitled to an injunction prohibitory as to future construction and operation and mandatory as to past construction.

It must be borne in mind that no right whatever has been acquired from the United States to go upon or cross these canals either by contract, condemnation or permit of any kind, and even if such a canal were in the possession of a private party, the railroad could not go upon the same and construct across it except by condemnation, contract or purchase of right. That the writ of injunction is a proper remedy for the protection of the Government property in the ditches in question is fully determined.

In this connection we would refer again to the opinion of Justice Brewer in the case of the United States vs. Brighton Ranch Company:

“We think, too, an action of injunction is the appropriate remedy, and that an action of ejectment would not furnish full protection to the Government. Generally speaking, any encroachment upon the public domain may be restrained or ended by injunction; and in this case it was not the mere fact that the fence is built upon Government land, because such fence operates not only as an entry upon the particular land upon which the fence is built, but also to separate the enclosed lands from the general body of the public domain. So that we think full and adequate remedy can be obtained only in a Court of Equity, which reaches the individual and compels him to abandon and desist from any encroachment on the public property.”

26 Fed. 218.

It is no defense to such occupation of Government property by an unauthorized person that he may allege that he does not intend to materially damage the same.

“Pecuniary interests sufficient to warrant an appeal to equity are plain enough and it is not material

to the question of jurisdiction—it is not for the Court to inquire—whether those interests are likely to be affected advantageously or disadvantageously by the unlawful conduct which it is sought to enjoin.”

U. S. vs. Worlds etc. Exposition, 56 Fed. 630, 639.

“Any trespass upon the public lands of the United States may be enjoined at the suit of the Government.”

U. S. vs. Brighton Ranch Co. 25 Fed. 465, 26 Fed. 218.

“An injunction will lie to restrain a threatened trespass consisting of the construction of a building or other structure on the property of another and after such construction a mandatory injunction will lie to compel its removal.”

22 La. An. 512.

75 Conn. 662, 55 Atl. 168.

7 Hun. 175.

66 Mich. 331, 33 N. W. 400.

150 Mass. 19, 22 N. E. 73, 5 L. R. A. 209.

167 Pa. St. 296, 31 Atl. 646.

29 Ore. 583, 41 Pac. 926.

21 R. I. 103, 41 Atl. 1001.

94 Md. 462, 51 Atl. 181.

Farrow vs. Vansittart, 1 Rail C. 602.

Barron vs. Korn, 127 N. Y. 224, 27 N. E. 804.

Henderson vs. N. Y. Central R. Co. 78 N. Y. 423.

Williams vs. N. Y. Central R. Co. 16 N. Y. 111.

It will be noticed that if the position of the government is correct, either as to the second, third or fourth part of this argument, the order of the lower court is in error and the Government is entitled to an order of reversal,

with direction to the lower court to enter judgment for the plaintiff in accordance with the prayer of the bill.

Respectfully submitted,

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AND B. E. STOUTEMYER,

Attorneys for Plaintiff and Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 1930

UNITED STATES OF AMERICA,

Appellants,

vs.

MINIDOKA & SOUTHWESTERN
RAILROAD COMPANY, AND
UTAH CONSTRUCTION
COMPANY,

Appellees.

IN EQUITY.

*Appeal from
Circuit Court,
District of
Idaho.*

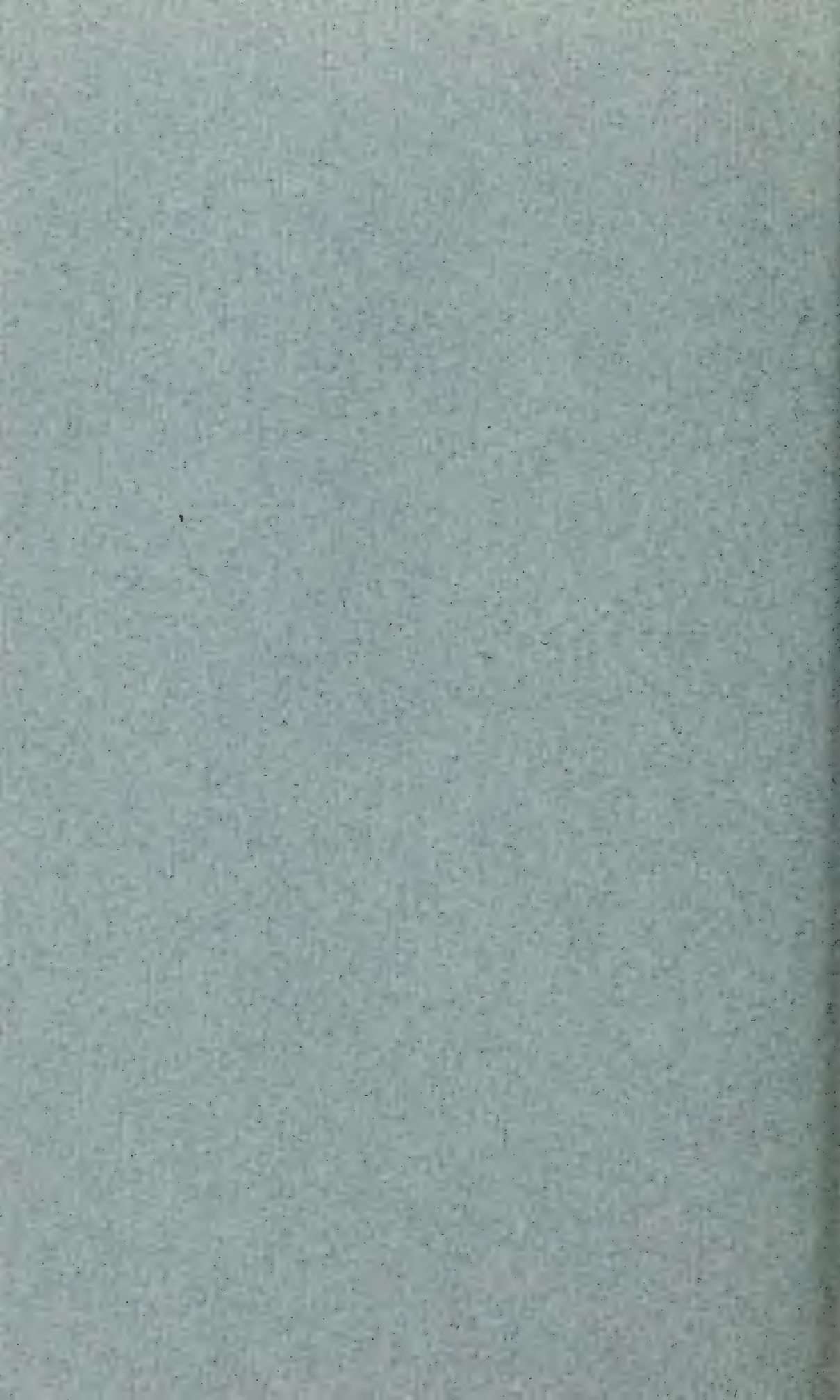
BRIEF FOR APPELLEES

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Filed 1911.

.....Clerk.



**In the United States Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.**

UNITED STATES OF AMERICA,
Appellant.

vs.

MINIDOKA SOUTHWESTERN
RAILROAD COMPANY, and
UTAH CONSTRUCTION
COMPANY,
Appellees.

BRIEF FOR APPELLEES.

STATEMENT.

In the lower court, the appellant, the United States of America, made an application for an injunction restraining the defendant, the Minidoka & Southwestern Railroad Company, from completing or constructing its railroad across certain lands and canals embraced within the boundary lines of the Minidoka Reclamation Project in Cassia County, Idaho. The substantial facts in this case are not in

dispute, and are that the lands over which defendant was at the date of the application, constructing its railroad, are situated within the Minidoka Reclamation Project;

That on the 7th day of November, 1902, the Secretary of the Interior, by order dated November 12, 1902, under the authority of Section 3 of the Act of June 17, 1902, withdrew from entry, except under the homestead law, the lands described in the bill of complaint, over which said railroad was being constructed, except that the lands in Section Thirty-six (36), Township Ten (10) South, Range Twenty-two (22) East, Boise Meridian, are school lands granted by the United States to the State of Idaho, and that those portions of said Section Thirty-six (36), crossed by said railroad line, have heretofore, since 1902, been sold by the State to private parties;

That the lands crossed by said defendant's line in Sections Nineteen (19) and Twenty (20), of Township Ten (10) South, Range Twenty-three (23) East, Boise Meridian, except the southwest quarter of the southeast quarter of Section Nineteen (19), Township Ten (10) South, Range Twenty-three (23) East, are patented lands for which patent was issued prior to said order of withdrawal;

That after the order of withdrawal above mentioned, as above set out, the lands involved in this suit over which said railroad is constructed and being constructed, are lands in the possession of various persons who had prior to the commencement of

this suit, filed on the same in accordance with the provisions of the homestead laws, subject to the provisions, limitations and charges of the Reclamation Act, said entrymen not yet having made final proof, but each and all of said entrymen prior to the commencement of this suit had conveyed to the defendant railroad company, by good and sufficient deeds, a right of way for its railroad over the lands in question, such right of way so conveyed being the land upon which the defendant company is and was at the time of the commencement of this suit, constructing its railroad; (Transcript Pages 115 to 117).

That said railroad company prior to the commencement of this suit had filed with the Secretary of the Interior, a copy of its articles of incorporation and due proofs of its organization as required by the Act of March 3, 1875, and was in such a position as to become specifically a grantee under said act, and at the time of the commencement of this suit was actually engaged in the construction of its railroad upon the ground. (Transcript pages 108 to 114).

The substantial facts in this case as will be seen, are not in dispute, and the questions of law arise upon the construction and application of certain Acts of Congress, to-wit:

1st.: The general right of way act of March 3, 1875.

2nd: The paragraph of the general appropriation act approved August 30, 1890.

3rd: An act amending Section 2228 Revised

Statutes United States, approved March 3, 1905, and
4th: The Reclamation Act, approved June 17,
1902.

The acts of Congress in so far as they have bearing upon the questions at issue in this case are as follows:

AN ACT Granting to railroads the right of way through the public lands of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Sec. 2. That any railroad company, whose right of way, or whose track or road-bed upon such right of way, passes

through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road; Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

Sec. 3. That the Legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled 'An act (to amend an act entitled an act) to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and

to secure to the government the use of the same for postal, military and other purposes, approved July first, eighteen hundred and sixty-two, approved July second, eighteen hundred and sixty-four.

Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

Sec. 5 That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed.

Sec. 6. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof.

Approved March 3rd, 1875.

18 Statutes at Large, 482.

From General Appropriation Act, approved August 30, 1890:

“For topographic surveys in various portions of the United States, three hundred and twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eighty-eight, entitled, ‘An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes,’ as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located, or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public

lands, or whose occupation, entry or settlement is validated by this act. Provided, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.”

Section 2288 Revised Statutes of United States:

“Any bona fide settler under the pre-emption homestead, or other settlement law, shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim.”

An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and

Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above states set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act; Provided, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled, "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

Sec. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom; and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

Sec. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works; Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prose-

cuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided. Provided, That the commutation provisions of the homestead laws shall not apply to entries made under this Act.

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon the lands in private ownership which may be irrigated by the waters of

the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

Sec. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one land owner, and no such sale shall be made to any landowner unless he be an actual bona fide resident of such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources

shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act.

Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs, and irrigation works constructed under the provisions of this Act: Provided, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

Sec. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within

thirty days from the receipt of the application at the Department of Justice.

Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Sec. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this Act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named, for the benefit of arid and semi-arid lands within the limits of such State or Territory: Provided, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semi-arid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable,

to the end that ultimately, and in any event, within each ten year period after the passage of this Act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Approved, June 17, 1902.

ASSIGNMENTS OF ERROR.

By referring to the transcript in this case, it is apparent in the outset that the appellant has not assigned any errors as provided by the statutes and the rules of this court. There are contained in the transcrip, six so-called assignments of error. Not one of these assignments presents any question of law that can be considered by this court. The assignments amount to nothing more than a statement that the Circuit Court erred in refusing to enjoin the defendants from constructing its railroad. They do not suggest any question of law, and in addition to the fact that no proper assignments of error were filed in the trial court, no assignments of error are contained in the brief. The rule in this regard is

well stated in the case of Doe vs. Waterloo Mining Company, 70 Fed. 455, as follows:

“Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particularly in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of the court. The assignment of error in question reads as follows: ‘There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant.’ This is too general. There is no specification showing wherein the decree is not supported by the evidence.”

See also:

Deering Harvester Co. v. Kelley, 103 Fed. 261; 43 C. C. A. 225.

McFarland vs. Golling, 76 Fed. 23; 22 C. C. A. 23.

Smith vs. Hopkins, 120 Fed. 921; 57 C. C. A. 193.

United States vs. Lee Yen Tai, 113 Fed. 465; 51 C. C. A. 299.

United States vs. Ferguson, 78 Fed. 103, 24 C. C. A. 1.

Grape Coal Creek Co. vs. Farmers' Loan & Trust Co. 63 Fed. 891; 12 C. C. A. 350.

We also call attention to the fact that neither the assignments of error, nor the citation in this case contain anything which may be considered to be a prayer for reversal as required by Section 997, Revised Statutes.

By reference to the appellant's brief in this case it will be seen how necessary the rules of the court are. In this respect appellant's brief is a mere rambling statement, and contains no argument stating concisely or otherwise any particular proposition of law; and leaves counsel for appellee, and this court, in such a position that it is almost impossible to understand the contention of the government.

ARGUMENT ON MERITS.

If we understand the record in this case, and the points decided by the lower court, and the matters argued in appellant's brief, the questions to be determined are:

1st: May a homestead entryman, whose lands are situated within a reclamation project convey a right of way for a railroad, and if so, what right of possession or title does the grantee obtain by such conveyance?

2nd: Is land situated in a reclamation project and filed upon by a homestead entryman, public lands, and what if any right of way can a railroad company acquire thereover by a compliance with the General Right of Way Act of March 3, 1875?

3rd: Is the right of way for the ditches in question a fee or an easement, and may the government prohibit the crossing of the same?

The first question we will discuss under the general heading:

EFFECT OF CONVEYANCE BY HOMESTEAD ENTRYMAN.

The contention of the United States seems to be that Section 2288 of the Revised Statutes of the United States has no application to reclamation homestead entrymen, and that such a homestead entryman cannot convey to a railroad company a right of way for a railroad across his land prior to the issuance of patent.

The Reclamation Act authorizes two classes of withdrawals, first: It authorizes the Secretary of the Interior to “withdraw from public entry the lands required for any irrigation works contemplated.”

Again it authorizes the Secretary “at or immediately prior to the time of beginning the surveys for any contemplated irrigation works to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works.”

United States vs Hanson, 167 Fed. 881.

Again it states: That public lands which it is proposed to irrigate “shall be subject to entry only

under the provisions of the homestead laws in tracts of not less than forty or more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms and condition” in the Act prescribed.

We fail to appreciate the argument made by the government in this case. Section 2288 of the Revised Statutes, in terms provides: That any **settler** under the **homestead** law, or other **settlement** law, shall have the right to transfer a right of way across such land, prior to patent, for a railroad. The entry in this case is a homestead entry. It is true that the settler must, before he can acquire his patent, pay the government a proportional cost of the expense of the irrigation works constructed for the irrigation of the land lying within the boundary lines of the Reclamation Project, but that does not, to any extent, or in any way, change the fact that his entry is technically and literally a homestead entry. The wording of the statute seems so plain that it appears to be unnecessary to attempt to construe it. However, it seems that there is no good reason for an attempt to disregard or construe out of the statute that which comes directly within its terms. After a homestead entry is made upon public lands, that land is taken out of the category of public lands, and thereafter a railroad company cannot acquire a right of way thereover by complying with the provisions of the Act of March 3, 1875. As has been stated by the courts many times, the Act of March 3, 1875, was not

intended as a mere gratuity. It was clearly the intention of Congress to encourage the development of the country in those regions which as yet were untraversed by railroads, and thereby to secure public advantages, to subserve the public interest and welfare, by holding out inducements of a free right of way over and across the public lands in order to encourage railroad companies to undertake and complete great and expensive undertakings in the construction of a work which was of a quasi-public character, in and through the undeveloped public lands. The law was intended to promote the interest of the government in opening to settlement, and by enhancing the value of these public lands through or near which a railroad was to be constructed, and the grant was not intended as a mere bounty or gift. That being the purpose of the government, and the law being such that a railroad company could not acquire a right of way by virtue of this act over public lands in the possession of settlers or entrymen, for the reason that the courts have construed such lands to no longer be public lands to which the provisions of said act apply after the same have been entered under any of the land laws, it became necessary to make some provision whereby a right of way over such lands could be acquired while the same remained in the possession of an entryman before patent. Hence, Section 2288 of the Revised Statutes of the United States was passed authorizing the settler or entryman to convey in a case where the right of way could

not be secured by virtue of the Act of March 3, 1875. One act is supplementary of the other, and is in pursuance of the same general public purpose.

It is argued by the appellant in this case that the government retains an interest in the entry prior to the time patent is issued, and that such interest the government has a right to protect, but the government freely grants to railroad companies rights of way through the public lands. Why, then, should it in the pursuit of any governmental purpose be put out of the power of the railroad company to acquire a right of way where lands are settled upon, or filed upon? It is apparent that such was not the intention of Congress, but the intention was that the government would freely grant a right of way up to the time its public domain was entered upon by settlers or entrymen, and that after such time any entryman or settler could grant the right of way.

If the contention of the government is the correct one, then the deed executed by the settler is absolutely worthless because if the entryman cannot give the railroad company the right to enter upon the land, and construct its railroad, on account of the reversionary interest held by the United States, and the Act of March 3, 1875, does not apply, then there is no way whereby a railroad company can acquire a right of way for a railroad across one of these reclamation projects, but the settlers on the land embraced therein, must be and remain without railroad facilities. And this would also be true if it became neces-

sary to acquire sites for churches, cemeteries and school houses and other public enterprises, or buildings, and in no case could any one acquire a right for any of these public purposes, except by special act of Congress. The contention made by the appellant in this respect is therefore, we conclude, not within the letter of the statute, but directly contrary thereto, and neither is it within the policy of the law, or the intent of the legislative body.

Certainly no good reason can be offered why this act should not apply to homestead entries in reclamation projects. These projects many times are of large area and the purpose of the government in passing the act was undoubtedly to aid in the development of the public domain, and to change the arid places of the west into cultivated fields and thereby be instrumental in building homes for its citizens. In order to carry out this purpose it is clear that the settlers on such arid lands must be in a position to have some other things besides water to irrigate their lands.

They must have railroads upon which to transport their crops to market. Churches in which to worship, schools in which their children may be taught, and places where the dead may be buried, and unless there is some way by which these conveniences may be acquired what person is there who would go upon this land and cultivate and reclaim it? Yet the government in this case says that there is no way unless by special act of Congress, because Congress

has provided no general law except the one cited above.

These observations show that if the provisions of the act are open to construction, the construction contended for by the government would be a ruinous one and one which was never intended by the legislature.

Appellant cites in its brief at pages from 28 to 31, numerous cases to the effect that the words of a public grant are to be construed strictly in favor of the government on grounds of public policy. We have read the appellant's brief over carefully with the purpose in view of attempting to arrive at counsel's theory in citing these cases. If any construction of the railroad right of way act is required, it should be construed in the light of the purpose of the government in passing it, and that purpose is well explained in the case of *Winona & St. Paul R.R. Co. vs. Barney*, 113 U. S. 618; and that purpose was, that railroads should be granted rights of way through the public lands in order to encourage railroad building so that the public domain might be settled up and improved, and as before stated, it would seem that there could not be any more necessary thing than that the settlers thereon should have convenient means of transportation, and the providing of such convenient means of transportation undoubtedly redounds to the advantage of the government in the same way that it would to an individual who gives a right of way through his lands in order to secure a railroad. Coun-

sel attempts to construe Section 5, of the Right of Way Act, although what a construction of that section has to do with the facts involved in this case, is not clear. We remark, however, that it is evident that when Congress used the words "otherwise reserved from sale" they clearly refer to such reservations as are similar to, and within the same class as the particular reservations mentioned. The reservations of the same character as military, park and Indian reservations, and the words "reserved from sale" evidently mean, reserved from disposition under the general laws because no way is provided for obtaining a right of way across lands reserved for such purposes except by treaty stipulation or act of Congress, and it was clearly not the intent of Congress that reclamation projects should be prohibited from having railroads until such a time as Congress should pass special acts allowing railroads to cross such projects, and such would follow as the inevitable conclusion if the word "sale" in this statute is given the construction for which the government contends. Our conclusion is that Congress meant by the words "otherwise reserved from sale" such lands as are reserved from disposition under general laws to be used by the government for some governmental purpose. This question is discussed and we submit a sound conclusion reached by the Supreme Court of Idaho in its decision filed Jan. 28, 1911 in the case of the Minidoka & Southern Rd. Co. vs. Weymouth, et al. We recommend to counsel an earnest consid-

eration of the Biblical quotation “The letter killeth but the spirit giveth life.”

DOES THE RIGHT OF WAY ACT OF MARCH 3, 1875 APPLY?

The contention made by the government in this case leads to rather an absurd conclusion. The attorneys for the government have prosecuted this suit to restrain us from building a railroad across the lands in the possession of homestead entrymen, these homestead entrymen having prior thereto conveyed to us the right of way upon which it is being constructed. The government contends that the homestead entrymen have not the power to do this.

It seems clear to us that if this land had not been entered as homestead land, that it would then have been such land as was subject to the right of way act of March 3, 1875, therefore, it seems reasonable that if there is a reversionary interest in the government, that as between the government and the railroad company the government's right has been extinguished by a compliance with that act.

The defendant company prior to the commencement of this suit had filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, so as to place it in a position to become a specific grantee under the provisions of the act. It had also prior to

the commencement of this suit, staked and laid out its road across the lands in question, a grade had been partially constructed, and was under construction, and in the possession of the defendant. It is true the railroad company had not filed a map of definite location, but it had complied with the law so as to bring it within the rule announced in the cases of *Railroad Company vs. Jones*, 177 U. S. 125; 44 Law Ed. 698, and *Oregon Short Line vs. Quigley*, 10 Ida. 770.

It cannot be reasonably contended that land situated within the boundaries of reclamation projects is taken out of the category of public lands by the withdrawal made by the Secretary of the Interior. Under this law two forms of withdrawal are provided for as stated by the United States Circuit Court of Appeals, Ninth Circuit in the case of *United States vs. Hanson*, 167 Fed. 881:

“That section makes provision for two distinct classes of reservations of public lands for two distinct purposes. It provides, first, that the Secretary may withdraw from public entry such lands as are required for the actual occupation of the reclamation service. This is for such purposes as reservoirs, canals, pumping works, etc. No exception whatever is expressed as to lands which are authorized to be withdrawn for these purposes. It provides, second, for the withdrawal of any other lands ‘believed to be susceptible of irrigation from said works.’ Such lands are to be withdrawn from entry, except under the homestead law.”

Any citizen who was properly qualified had the legal right after the withdrawal to go to the land office of the district in which the land was situated and file upon the same in accordance with the provisions of the homestead law, that is, the general law of the United States governing homestead entries. Such a filing being subject to the same requirements made in cases of homestead entries generally. It is true that after the irrigation works are constructed, and during their construction, the person making the filing must comply with the additional exactions of the Reclamation Act, but such additional exactions do not in any sense take away from the land its character as public lands.

The question as to what are public lands has been passed upon by the courts many times. The words "public lands" have long had a settled meaning in the legislation of Congress, and when a different intention is not clearly expressed, the term "Public Lands" is used to designate such land as is subject to sale or other disposal under general laws.

Union Pac. Rd. Co. vs. Harris, 215 U. S. 386.

Newhall vs. Sanger, 92 U. S. 761; 23 Law Ed. 769.

Bardon vs. Nor. Pac. R. R., 145 U. S. 535; 36 Law Ed. 806.

Doolan vs. Carr, 125 U. S. 618; 31 Law Ed. 844.

Cameron vs. U. S., 148 U. S. 301; 37 Law Ed. 459.

Mann vs. Tacoma Land Co., 153 U. S. 273;
38 Law Ed. 714.

Barker vs. Harvey, 181 U. S. 481; 45 Law
Ed. 963.

Scott vs. Carew, 196 U. S. 100; 49 Law Ed.
403.

A case very much in point is *United States vs. Blendaur*, 128 Fed. 910, decided by the Circuit Court of Appeals of the Ninth Circuit. The syllabus of that case is as follows:

“1. Public lands—Forest Reserves
—Lands subject to be set apart.

“The 15 townships of land in the Bitter Root Valley, Mont., formerly occupied by the Flathead Indians, which by Act of June 5, 1872, c. 308, 17 Stat. 226, providing for the removal of the Indians therefrom, were made subject to sale, and to which the homestead laws were extended by Act Feb. 11, 1874, c. 25 18th Stat. 15, became a part of the general public domain, and, as such, were subject to the Act of March 3, 1891, c. 561, 26 Stat. 1103, (U. S. Comp. St. 1901 p. 1537), authorizing the President by proclamation to set apart Forest Reservations in ‘Public lands.’

“2. Sale—Construction of Statute
—Meaning of words ‘Public Lands.’

“The words, ‘public lands’ are not always used in the same sense in acts of Congress, and should be given such meaning in any act as comports with its purpose and intent.”

In the body of the opinion the Court uses the following language,—at the bottom of page 912:

“Lands to which a homestead claim may attach must necessarily be a part of the general public domain, and must be unappropriated lands, not held back or reserved for any special or public purpose.”

Certainly there can be no question but that the homestead law is a general law. It is one of the most general laws that we have. It is true that the United States makes provision for the irrigation of the land situated within the boundaries of one of these reclamation projects, and the people who file upon the land must pay for the water, but the land is disposed of under the provisions of the homestead law.

The first syllabus of a case decided by the Supreme Court of Idaho *supra*, exactly covers this question, and is as follows:

“Lands withdrawn under the acts of Congress of June 17, 1902, known as the Reclamation Act, for the purpose of irrigation under an irrigation system constructed by the government, and which lands are subject to homestead entry under the act of Congress, are public lands within the meaning of the Act of March 3, 1875, known as the Railroad Right of Way Act, and are subject to railroad rights of way for any railroad company which complies with the provisions of the Act.”

It seems evident, therefore, that laying aside any question of the right of the homesteader, this land was such land as was subject to the general railroad right of way act, and so far as the government's rights in it are concerned, if it had any rights, the same had been extinguished by a compliance with that act by the railroad company.

This argument leads us to the conclusion that Congress intended in so far as it was possible to do so, without infringing upon the rights of entrymen and settlers, to freely grant rights of way across the public domain, and that such intention applied to lands situated within reclamation projects subject to entry under the homestead laws. Therefore we submit that the government is not in the slightest way interested in this controversy, or injured by any act of the defendant. If it has a reversionary interest, no reason is apparent why that interest should not pass by virtue of the provisions of the Act of 1875. A lucid exposition of these several Acts of Congress is given in the opinion of the Court below. (Transcript, pages 60 to 77.)

In the case of the United States of America vs. Denver & Rio Grande R. R. Co., 150 U. S. 14; 37 Law Ed. 975, it is said:

“It is undoubtedly, as argued by the plaintiffs in error, the well settled rule of this court that public grants are construed strictly against the grantee, but they are not to be construed so as to defeat the intent of the legislature, or to

withhold what is given either expressly or by necessary or fair implication.”

In *Wiona & St. Paul R. R. Co., vs. Barney*, 113 U. S. 618, 28 Law Ed. 1109, Mr. Justice Field, speaking for the court, said, page 625:

“The acts making the grants are to receive such construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.”

Rule Twenty-four (24) of this Court requires that the brief of the appellant shall contain “a concise abstract or statement of the case; presenting succinctly the questions involved in the manner in which they are raised.”

On the first page of the appellant’s brief in this case it is stated that “The stipulation contains about as concise a statement of these facts as it is possible to give, and, therefore, they are given in the language of the stipulation.” And following that it quotes what the appellant chooses to include. And in this connection we submit it may be justly suggested that it makes in this quotation substantial omissions that indicate a lack of candor and sincerity. It omits the first substantial stipulation contained on page 86, to

the effect that the defendant railroad company is a corporation organized and existing under the laws of the State of Idaho; then follow several stipulations, beginning with the “second” and extending to and including the tenth. It then omits the eleventh and twelfth (page 91 of the Record), and begins with the thirteenth, numbering it as the eleventh, following then with numbers successively but two numbers less than the subsequent numbers as shown in the record. (See Record, pages 91 to 96 inclusive).

The recital as thus made as to the facts stipulated ends with the words “Mr. Robinson’s statement,” on page 120 of the Record; and omits what follows up to and including the statement of the Court, on page 122, of the words, “This really amounts to a license, then, to construct the railroad upon this land so far as the entrymen is concerned,—so far as he could give the license.”

The appellant at page 37 of its brief, under the heading of “Third,” having omitted from its statement the matter last above referred to on pages 120 to 122, bases a sophistical argument that the railroad company has obtained no conveyance from the settler in the south half of Section Fourteen (14) Township Eleven (11) South, Range Twenty-two (22) East. The record in this case shows that there is a small piece of this land over which the railroad was being constructed for which no conveyance has been procured, but this particular tract of land was filed upon by a homestead entryman and in his possession.

The facts as to the right of way across this tract of land are: That the entryman thereon who was in possession of it made no objection to the building of the road across it, and the understanding was that settlement would be made with him later, and this homestead entryman stated to the employes of the defendant company in charge of the construction of the road, that they could go ahead and construct the road and that arrangements could be made with him later. (Trans., pages 120, 121, and 122.) This arrangement amounted to a license, and this homestead entryman is not complaining. The defendant company of course assumes that it will have to procure from this entryman a conveyance for this right of way, but that is a matter between the entryman and the railroad company, and is one in which the government is not interested. The cases cited by counsel have no application, and in view of the fact that the entryman agreed that we might go on the land and construct the railroad, and gave us possession, it seems absurd for counsel to attempt at this time to inject into this case this proposition. The cases cited by counsel do not appear to us to have any application at all to the points of law involved in this case.

NATURE OF UNITED STATES TITLE TO ITS DITCHES.

Under the heading designated “Fourth,” found at page 39 of appellant’s brief, counsel seem to contend that the government has an absolute fee simple title to the ditches which the railroad company crosses with its railroad, and that therefore the railroad cannot cross them. It is manifestly impossible for the railroad company to condemn a right to cross these ditches as condemnation proceedings would not lie against the government, therefore, counsel’s contention amounts to this: That where one of these ditches crosses the land of an entryman, or other person, no person may construct a crossing over the ditch unless Congress by special act provides therefor, so we find, that a ditch is constructed under the authority of the government, but no one can cross it. The farmer through whose field it runs may not build a bridge across it so that he can haul crops from one field to another. He may not put a fence across it. In fact this ditch is an absolute barrier to progress, and no person must set a foot upon this sacred ground. It appears clear to us that this right of way for a ditch carries with it only the incidents of an easement in so far as crossing it is concerned. The cases cited by counsel appear to us to have not the slightest application to the matters involved. The railroad company is not attempting to appropriate any part of the right of way, it is simply

attempting to cross the ditches, and in such a manner as to not interfere in any way whatever with the rights of the government to run water therein unobstructed and undiminished in quantity or quality. The government had not withdrawn any rights of way under the first section of the Reclamation Act, but relied upon the act of August 30, 1890 for such rights of way. The trial court in its decree (Transcript, pages 79 to 84) fully and completely protected the rights of the appellant and required the defendant company to so construct the bridges and crossings as to not injure in any way the rights of the government. Therefore, it is our view that there is nothing whatever in the contention of the government in this matter.

In conclusion upon the whole case we desire to state, that the appellant's brief indicates that this is not an attempt on the part of the government to protect any substantial rights that it has, but seems to be an attempt to harrass and annoy the defendant company, and the reason for such position is nowhere apparent. It seems that instead of attempting to block the building of this railroad, the government ought to encourage it, and thus aid settlers in this section of the country in obtaining means of transportation, but although the government does not want to construct a railroad itself, it seems in this case to be pursuing a "dog in the manger" policy, and the appeal that has been taken in

this case seems to be frivolous and without the slightest merit whatever.

We submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

P. L. WILLIAMS,
D. WORTH CLARK,
Attorneys for Appellees.

1930

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE UNITED STATES, Appellant,

vs.

**THE MINIDOKA & SOUTHWESTERN RAILROAD
COMPANY, a Corporation, and THE UTAH
CONSTRUCTION COMPANY, a Corporation,
Appellees.**

**Appellant's Reply Brief
to Appellees' Petition for Rehearing.**

**C. H. LINGENFELTER,
B. E. STOUTEMYER,**

Attorneys for Appellant.

FILED

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This cause was head by your Honors in February and decided in September, 1911, after what has evidently been a lengthy and very careful consideration of the issues involved.

The question involved in this case is of vital and far-reaching importance to the Government in the operations of one of its most important branches. In its last analysis, the question here presented amounts to this: Has the Government sufficient control over its public lands and irrigation works so that when it has withdrawn public land for irrigation and reclamation and has constructed an irrigation system to reclaim the same at a cost of millions of dollars, no part of which has been repaid, it may prevent the destruction of the irrigable area of the project

by piecemeal or as an entirety and the occupation of the right of way of its canals by a corporation which has taken possession without the consent of the Government, and is admittedly destroying the irrigability and the agricultural value of that portion of the project which it has so appropriated, and is building structures in and across the Government canals?

Under these conditions, we feel that we should not fail to reply to the Petition for a Rehearing, although it appears to be largely a reiteration of the arguments presented at the hearing of this case.

The first half of the Petition for Rehearing is devoted to an extended argument under the heading, "Lands Entered at Land Office Not Public Lands Subject to Act March 3, 1875." The court has held that the railroad company failed to obtain any rights under the Act of March 3, 1875, on account of its failure to comply with the plain requirement of the law, that it file its profile and obtain the approval of the Secretary of the Interior.

The railroad company argues at length that it did not obtain any rights under the Act of 1875 because land entered at the land office is not subject to that Act.

And the Government is firmly of the opinion that the railroad company failed to obtain any rights under the Act of 1875, for the reason given by the court, and also for several other reasons which will be explained later.

So it appears that while there is some difference of opinion as to the reason, there is none as to the fact and the railroad company, the Government and the court are fully agreed and in complete harmony upon the essential point, that the railroad company did not as a matter of fact obtain any rights under the Act of 1875.

That being disposed of, leaves nothing further for con-

sideration, except the question as to what rights the railroad company has acquired by purchase from the settlers under the Act authorizing a settler to convey a portion of his entry by warranty against his own acts. And this conveyance is limited by the express language of the statute to a conveyance of a portion of the interest of the settler.

The rule of construction has been stated by the Court to be :

“A fundamental rule of construction for such a grant has long been established. This rule requires the courts to construe the grant strictly in favor of the public; nothing passes but what is granted in clear and explicit terms.”

That this is a correct statement of the rule of construction has not been denied and cannot be.

To hold that by a conveyance from a settler of a portion of *his* claim by *warranty against his own acts*, a railroad company acquires the interest of the United States or any part of it, would nullify the plain language of the statute, would violate the long established and fundamental rule of construction, that “nothing passes but what is granted in clear and explicit terms,” and would also violate that elementary rule of all real property law, which denies to any person holding a partial interest in real property the right to convey a greater interest than he himself possesses. He may not be able to convey all that he possesses. The homesteader can not convey indiscriminately, neither can a tenant for years under certain leases. But he certainly could not convey more than he possesses. The Supreme Court has held that the homestead entryman has a possessory right and occupies a position similar to that of a tenant for years or for life while the Government holds

the fee and occupies a position similar to that of the lessor or remainderman.

Shiver vs. United States, 159 U. S. 491, 40 L. Ed. 231.

It requires no argument to show that a deed from a tenant for years or for life could not suffice to dispose of the interest of the lessor or remainderman.

“Effect of Estates for Life or Years on the Right to Damages. Any person having an interest in property may recover for any damage to his interest. A tenant may recover for injury to his crops or to his leasehold. In the New York Elevated Railroad cases, it is held that where there is an outstanding estate for life or years at the time the road is built, the damages to rental value belong to the owner of such estate, but the existence of such an estate does not prevent the owner of the fee or reversion from recovering the permanent or fee damages in a suit to enjoin the operation of the road.”

Lewis on Eminent Domain, 3d Edition, Par. 950 (653d) and numerous cases there cited.

The stipulated facts in regard to the nature and effect of the acts being performed by the railroad company are very clear and are as follows:

On page 89 of the transcript:

“Fourth. That all the lands under said Minidoka Project and the extension thereof are arid in character, and require irrigation to produce agricultural crops thereon, but are productive when irrigated.”

On page 93 of the transcript:

“Nineteenth. That under the provisions of said Reclamation Act of June 17, 1902, the complainant has expended in excess of \$1,300,000.00 in the construction of the irrigation works for the irrigation of

the lands lying under said South Side Minidoka Pumping Project, a portion of which is the land above described, which is now being taken possession of, excavated and thrown up into a railroad grade by said railroad company."

On page 94 of the transcript :

"Twenty-one. That the said lands now being occupied and excavated by said railroad company as a railroad grade are in their natural condition well suited for irrigation and cultivation."

"Twenty-two. That by said excavation and the construction of said railroad grades, and the digging out of said borrow pits said lands now being occupied and graded into a railroad grade are rendered unsuitable and worthless for irrigation and agricultural purposes."

These are acts which would undoubtedly constitute waste if done by a tenant for years or for life.

"The conversion of land from one species to another is waste in England; as to turn arable land into pasture or meadow, or meadow into arable, or arable into woodland, are all of them waste. In this state the question of waste depends upon the fact whether the injury to the land works a permanent or present injury to the freehold. Surely, then, the turning of arable land, not into woodland, but to the uses of a highway, to be trampled upon and cut up by the feet of horses and the wheels of vehicles, would be waste much more serious and injurious to the freehold than turning it into woodland, or to a different species of husbandry."

Dills vs. Hampton, 92 N. C. 565.

"Waste is the destruction or material alteration of any part of a tenement by a tenant for life or years, to the injury of the person entitled to the inheritance. (1 Steph. Comm. 241.) And it may be committed as well by destruction to any part of a tenement. It is waste to alter buildings, or vary in any manner, the permanent erections. (5 Wait, Act & Def. 239; Tayl. Landl. & T. 348.) The injury to the realty must be

of a permanent character—some act which does a lasting injury to the property or tends to destroy its identity; and this may be accomplished by any alteration of the property which is material and of a substantial nature.”

Davenport vs. Magoon, 4 Pac. 299, 301, 13 Or. 3,
57 Am. Rep. 1.

Beekman vs. Van Dolson, 18 N. Y. Supp. 376, 377,
63 Hun. 487.

McGregor vs. Brown, 10 N. Y. 114, 117.

Hamilton vs. Austin, 36 Hun. 138, 143.

Eysaman vs. Small, 15 N. Y. Sup. 288, 289, 61 Hun.
618.

Price vs. Ward, 58 Pac. 849, 850, 25 Nev. 203, 46
L. R. A. 459.

Proffitt vs. Henderson, 29 Mo. 325, 327.

Whitney vs. Huntington, 34 Minn. 458, 462.

Dills vs. Hampton, 92 N. C. 565.

All authorities agree that while a homestead entryman has a right of possession and may or may not at some future time become entitled to a patent he has not such an interest as will permit him to commit waste on the premises.

Shiver vs. United States, 159 U. S. 491, 40 L. Ed.
231.

United States vs. Taylor, 35 Fed. 484.

United States vs. McEntee, 23 Int. Rev. Rec. 368.

United States vs. Nelson, 5 Sawy. 68.

The Timber Cases, 11 Fed. Rep. 81.

United States vs. Smith, 11 Fed. Rep. 493.

United States vs. Stores, 14 Fed. 824.

United States vs. Yoder, 18 Fed. 372.

United States vs. Williams, 18 Fed. 475.

United States vs. Lane, 19 Fed. 910.

United States vs. Freyburg, 32 Fed. 195.

United States vs. Murphy, 32 Fed. 376.

United States vs. Cook, 86 U. S. 19 Wall 591.

The railroad company's assertion that, "if the entryman himself desires to build a railroad from one corner of his land to the other there would be no power resting in the Government to prevent it," is not supported by authority and is not the law. If the entryman were himself doing those acts which the railroad company is doing, he would be committing waste and the Government would not be without a remedy.

Shriver vs. United States, 159 U. S. 491, 40 L. Ed. 231.

As to the Cases Cited In the Petition for Rehearing.

Under the heading, "Lands Entered at Land Office Not Subject to Act of March 3, 1875," the appellees have quoted passages from a number of decisions of the Land Office and some from the courts in which it has been held that where public lands are occupied by settlers, whether they be homestead entryment, pre-emption entrymen, or merely squatters or occupants of the public lands, the lands so occupied can not be taken by a railroad company under the Act of March 3, 1875, without purchasing or condemning the possessory rights of the settlers. In this connection, Section 3 of the Act is usually quoted by the courts—

"That the Legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned,"

as showing the intention of Congress that the possessory rights of settlers on the public lands may not be appropriated by a railroad company without payment.

The principle involved in this class of cases is in entire harmony with your honors' decision, which is that both the settler and the Government are interested in the land included in a Reclamation Homestead Entry, the settler having the possessory right subject to certain conditions and privileges and the Government holding the fee, and that the railroad company must acquire the rights of both before it can have a complete title. The decision on this point is:

"These two statutes taken together appear to meet the requirements of the situation, and to authorize the railroad company upon complying with certain conditions to acquire from both the Government and the settler a right of way which the Government should not in justice to the settler grant without his consent, and which the settler could not convey without the permission of the Government since he can only transfer by warranty against his own acts."

The fact that the courts protect the settler by requiring purchase or condemnation of his possessory right as provided in Section 3 of the Act of 1875, is certainly no reason why they should not protect the fee title interest of the Government by requiring compliance with the plain provisions of Section 4.

If Section 4 were intended to be considered merely permissive for the purpose of obtaining advance rights, as argued by the railroad, it would read, "That any railroad company desiring to secure the benefits of this act *in advance of construction may file, etc.*" But such is not the language of statute. The statute provides:

"That *any* railroad company desiring to secure the benefits of this act, *shall file, etc.*"

This is not language which would be consistent with the view that the public lands can be secured under this act without filing.

And the Supreme Court has decided that compliance with Section 4 is necessary .

“A right of way is granted but to secure it three things are necessary: (1) Location of the road; (2) Filing of profile of it in the local land office; and (3) The approval thereof by the Secretary of the Interior to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad.”

Minneapolis R. Co. vs. Doughty, 208 U. S. 251.

“And thereafter are the words of the statute, ‘all such lands over which such right of way shall pass shall be disposed of subject to such right of way.’ It would be a free construction of these words to give them the meaning for which the railroad company contends. They neither convey an unnatural sense nor lead to an unnatural consequence. Unless rights under the Act of 1875 and rights under the land laws were to be kept for an indeterminate time in uncertainty and possible conflict, to fix some act or point of time at which they should attach was natural, and to construe language which is apt and adequate by its sense and arrangement to express one thing to mean another would be pretty free exercise of construction.”

Minneapolis R. Co. vs. Doughty, 208 U. S. 251.

And such also appears to be the view taken by the State courts. Referring to the question whether a homestead is such public land as may be taken by a railroad company, without compensation to the entryman, the Oregon court says:

“It may well be doubted whether this question is presented by this record, for the reason that it does not appear that the appellant has filed with the Secretary of the Interior a copy of its Articles of Incorporation and due proofs of its organization under the

same, as required by the first section of the Act; nor does it appear that it ever claimed the benefits of said act *as required* in the fourth section, *by filing with the register of the land office of the proper district a profile of its road, or that the same was ever approved by the Secretary of the Interior. These are plain requirements of the act; and without entering at large upon their discussion at this time, I think it sufficient to say that, before the appellant could acquire any rights under the Act as against one in possession of the land in question, it must show a compliance with its terms.*"

Larsen vs. Oregon R. & Navigation Co. 23 Pac. 974.

"The fourth section requires it within a certain time to file with the register of the land office, for the district where such land is located, a profile of its road; and upon approval thereof by the Secretary of the Interior that it shall be noted on the plats in the land office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. This is not in the nature of an absolute grant in praesenti to a designated company as in the case Railroad Co. vs. Baldwin, 103 U. S. 426, where it was held that as soon as the route was definitely fixed the title attached from the date of the Act. This Act is in the nature of a general offer to the public *which takes effect and becomes operative as a grant to a particular company only when it accepts its terms by a compliance with the conditions precedent prescribed in the act itself.*"

Red River, etc., R. R. Co. vs. Sture, 32 Minn. 95, 20 N. W. 229.

As to Construction of the Railroad.

Counsel for the railroad company says: "We desire to again urge upon the court our understanding of the law that it is not necessary to file a map in accordance with the provisions of Section 4 of the Act of March 3, 1875, in cases where the railroad company has placed itself in such

a position as to become specifically a grantee under the Act and has in addition to placing itself in that position actually constructed its road upon the ground."

It has never been held that as against the Government itself a railroad company can acquire any valid right under the Act of 1875 without filing the profile required by that Act. As between two private parties claiming against each other by occupation and construction on the public land, the railroad company, if it has constructed its railroad before the settlers' rights have attached by possession or entry, will be held to have the better right, and such was the decision in the case of *Jamestown & Northern vs. Jones*, which is cited by the appellees, but the same rule applies as between two agricultural occupants or "squatters," and yet it has been fully decided that neither of such occupants would have any right as against the Government itself.

United States vs. Hanson, 167 Fed. 881.

Frisbie vs. Whitney, 9 Wall 187.

Yosemite Valley Case, 15 Wall 77.

The settler can acquire rights against the Government only by making the required filings in the land office, and by analogy the same rule would appear to apply to a railroad company, for it has been fully decided that the rights of a prior settler, occupant, or squatter on the public lands are superior to those of a railroad company claiming under the Act of 1875 and cannot be taken without purchase or condemnation.

Washington & Ida. R. R. Co. vs. Osborn, 160 U. S. 103, 40 L. Ed. 356.

But it is equally well settled that the rights of the squat-

ter which are superior to those of the railroad company are in turn inferior to those of the Government.

United States vs. Hanson, 167 Fed. 881.

Frisbie vs. Whitney, 9 Wall 187.

Yosemite Valley Case, 15 Wall 77.

So the conclusion seems obvious that the rights of the railroad being subordinate to those of the squatter could not be considered superior to those of the Government, even if the road were completed.

And this view is sustained by the language used by the Supreme Court in the case of Minneapolis & St. P. Ry. Co. vs. Loughty, 208 U. S. 251, where the court said:

“A right of way is granted but to secure it three things are necessary: (1) Location of the road; (2) Filing of profile of it in the Local Land Office; and (3) The approval thereof by the Secretary of the Interior to be noted upon the plats in the local office. It is after these things are done that the statute fixes the right of the railroad.”

The rule of construction in a case between the Government and a private party claiming a grant from the Government is essentially different from that which might be applied as between two private parties. The fundamental rule of construction between the Government and the party claiming a grant from the Government has been long established. This rule requires the courts to construe the grant strictly in favor of the State or Government; nothing passes but what is granted in clear and explicit language.

This long established rule of construction when considered in connection with the fact that the language of the statute requiring the filing of the profile by all railroads desiring to receive the benefits of the Act is most

positive and explicit, that under the language of this statute there is no exception in favor of any railroad or class of railroads, and the words of the statute are "shall file," not "may file," and that "thereafter" the lands shall be disposed of subject to the right of way of the railroad; all of these considerations make it impossible to hold that a railroad company can acquire a valid title against the Government under the Act of 1875 without complying with the plain requirements of the act under which it claims, and such was evidently the view of the Supreme Court when it wrote:

"It is after these things are done that the statute fixes the right of the railroad."

So far as the present case is concerned the most obvious answer to the railroad company's claim of title against the Government by reason of the actual construction of a railroad on the ground lies in the fact that the record in this case plainly shows that they have not constructed any railroad but have only partially constructed a railroad grade, and it is a matter of common knowledge that a partially constructed railroad grade or even a completed railroad grade is not a railroad.

The stipulation of facts in regard to the amount of construction done by the railroad company is as follows:

On page 92 of the transcript.

"Fifteenth. That after the withdrawal of the above described lands as above set out, and the entry thereof by the several entymen, the defendant railroad company went upon said lands and made surveys for a railroad line across the same from said town of Burley to said town of Oakley and let contracts for the construction thereof, and that said railroad company, and its said contractor, the Utah Construction Company, have gone upon said lands and partly constructed said railroad grade and railroad line and is

threatening to continue the same to completion and will continue the same to completion unless restrained by the order of this Court."

"Seventeenth. That said railroad construction and threatened construction consists of a railroad embankment upon which railroad ties and rails are to be laid, the borrow pits, etc."

And on page 94 of the transcript.

"Twenty-two. That by said excavation and the construction of said railroad grades, and the digging out of said borrow pits, said lands *now being occupied and graded into a railroad grade* are rendered unsuitable and worthless for irrigation and agricultural purposes."

What a railroad is is so well known that it would seem to be hardly necessary to offer definitions of the word "railroad" in order to show that a company which has partially constructed a railroad grade has not constructed a railroad.

But if definitions are desired, the following will cover the case:

Railroad. "A road graded and having rails of iron or other material for the wheels of railroad cars to run upon."—*Bouvier's Law Dictionary*.

Railroad. "A road or way on which iron or steel rails are laid for wheels to run on for the conveyance of heavy loads in cars or carriages propelled by steam or other motive power."—*Black's Law Dictionary*.

Railroad. "A road or way consisting of one or more parallel series of iron or steel rails patterned and adjusted to be tracks for the wheels of vehicles and suitably supported on a bed or substructure."—*Webster*.

Railroad means one capable of being used, not a road bed capable of receiving rails.

Troy & B. R. Co. vs. Boston H. T. & W. Ry. Co., 86 N. Y. 107.

Miller vs. Rutland & W. R. Co., 36 Vt. 452, 493.

State vs. Baltimore & O. R. Co., 48 Md. 49, 74.

“Road”, as used in a mortgage by a railroad company on the road and its franchise, means the road in its completed condition, proper and ready for use in running over it in the ordinary manner of that kind of business. It was not a road—that is, a railroad—but only a roadway when it was only located between two termini and in process of construction, but in no part completed ready for use.

Miller vs. Rutland Co., 36 Vt. 452, 493.

“In its ordinary acceptance, the term railroad fairly includes all structures which are necessary and essential to its operation.”

United States vs. D. & R. G. 150 U. S. 1.

United States vs. Chaplin, 31 Fed. 890, 895.

The argument is made by the attorneys for the railroad company that the construction of a railroad grade fixes the location of the road and that when the location is fixed the grant passes, but this is the very argument made by the attorneys for the railroad company in the case of Minneapolis & St. P. Ry. Co. vs. Doughty.

“Did the district court and supreme court construe this section correctly? The railroad contends against an affirmative answer, and urges that it is the location of its road which initiates a railroad company’s right.”

But this contention of the railroad attorneys was denied by the court in the language which has already been quoted in your Honors’ opinion.

The railroad company further urges that the filing of the profile is a mere matter of form and that the Government is not entitled to an injunction, but that if an injunction should issue it should only remain in force until the map is filed and that the railroad company should not

be required to secure the approval of the Secretary of the Interior.

Such an interpretation would indeed make the filing of the map a mere formality, would give the railroad company a free hand to destroy the irrigable land of the Government project and to so change the natural conditions of the land as to make the reclamation of the remaining portion much more difficult and costly, and the Government would lose all control and all power to protect either its interest in the land itself or its investment in the irrigation works whose value must depend upon the preservation of the land in a suitable condition for irrigation.

And such an interpretation would be in direct conflict with the decision of the supreme court in the Doughty case, in which the court holds that to secure a right of way three things are necessary, and gives equal importance to the location of the road, the filing of the profile, and the approval of the secretary and declares that it is only after all of these conditions have been complied with that the right of the railroad attaches.

In regard to the definition of the word "profile," it must be admitted that the definition given by the court is the true meaning of the word and the only definition which can find support in any authority in regard to the English language. This is a common word of well known meaning and it certainly will not be presumed that Congress did not know its meaning or did not intend it to convey its proper and well known meaning.

Where a railroad crosses an irrigation project, the profile is very necessary as it is highly important for the Government officers to know the grades of such a road in order to determine to what extent it will interfere with the Government canals and laterals. Where no Govern-

ment construction work is involved it may not be necessary that the Government should know the grade of the railroad, but the fact that in some such cases the land office has not insisted upon the filing of a profile does not deprive the Government of the right to do so, especially where, as on Reclamation Projects, conditions have arisen which make it highly important that the Government should have the information which the profile would give.

The Rights of the Homestead Entryman Are Possessory Rights.

While a homestead entryman may or may not at some future time become entitled to a patent, until he has earned the patent by compliance with the law his rights are merely possessory and the Government holds the fee title and the ownership of the land, and your Honor's opinion that "these claims are, therefore, nothing more than possessory," is correct and supported by abundant authority.

The Supreme Court has said:

"From this resume of the Homestead Act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued."

Shiver vs. United States, 159 U. S. 491, 40 L. Ed. 231.

"I charge you that the right of the homesteader is one of occupancy only, but with certain rights and privileges subject to the right and duty of the Government to protect the timber on the land."

United States vs. Taylor, 35 Fed. 484.

"Hence I charge you that the United States had when this suit was brought, and now have, such possession as entitles them to maintain this action; that the receipts of the Receiver of the Land Office are not

of themselves sufficient evidence that the Government's title has been divested, and that it has vested in the homestead claimants. Until they have made the final proof and obtained the title—that is so fulfilled their obligations under the law as to entitle them to patents—it is not allowable to them to cut the timber on the lands, or take any crude turpentine or other material therefrom for the purpose of sale or speculation.”

United States vs. Taylor, 35 Fed. 484.

The case of Shiver vs. United States contains such a full and clear discussion of the rights of the homestead entryman that we will quote from it at length. It must be borne in mind, of course, that this discussion relates to the general homestead law and that under the Reclamation Act many additional limitations and restrictions are imposed.

“This case turns upon the questions as to what are ‘lands of the United States’ within the meaning of Revised Statute 2461, providing for the punishment of persons guilty of cutting timber upon such lands other than for the use of the navy. Obviously, the question is not whether such lands are so far withdrawn from sale as to be no longer subject to appropriation by any railroad or other person or corporation to which a land grant has been made, but whether they are still so far the property of the United States that the Government may protect itself against an unlawful use of them. Indeed, this court has settled, by repeated decisions, that the claim of a homestead or pre-emption entry made at any time before filing a map of definite location of a railway, prevents the lands covered by such claim from passing to such railway under its land grant, even though such entry be subsequently abandoned. (Kansas P. R. Co. vs. Dunmeyer, 113 U. S. 629; Hastings & D. R. Co. vs. Whitney, 132 U. S. 357; Whitney vs. Taylor, 158 U. S. 85; Sioux City & I. F. Co. vs. Griffey, 143 U. S. 32.)”

“The same principle applies where lands have been

reserved for any purpose whatever. (Wilcox vs. Jackson, 38 U. S. 13 Pet. 498; Witherspoon vs. Duncan, 71 U. S. 4 Wall 210; Newhall vs. Sanger, 92 U. S. 761; Kansas P. R. Co. vs. Atchison T. & S. Co. 112 U. S. 414.)”

“While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands by the first appropriation, or that they cease to be the property of the Government. Upon the contrary, it was said by this Court, as early as 1839 in Wilcox vs. Jackson, 38 U. S. 13 Pet. 498, 516, that:

‘With the exception of a few cases nothing but the patent passes a perfect and consummate title.’”

So in Frisbie vs. Whitney, 76 U. S. 9 Wall. 187, 193:

“There is nothing in the essential nature of these acts (entering upon land for the purpose of pre-emption) to confer a vested right, or indeed, any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right.”

“In this case, the following extract from an opinion of Attorney-General Bates was quoted with approval:

“‘A mere entry upon land, with continued occupation and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preemption. But this is only a privilege conferred on the settler to purchase lands in preference to others. His settlement protects him from intrusion or purchase by others, but confers no right against the Government.’

“A number of authorities were cited to the same effect. It was held that it was within the power of Congress to withdraw land which had been pre-empted from entry or sale, though this might defeat the imperfect right of the settler.

“In Hutchins vs. Low (The Yosemite Valley Case), 82 U. S., 15 Wall 77, the construction given to the pre-emption law in Frisbie vs. Whitney was approved, the Court observing, Page 88:

“‘It is the only construction which preserves a wise control in the Government over the public lands, and prevents a general spoilation of them under the pre-

tense of intended pre-emption and settlement. The settler being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the Government, a convenient protection for any trespass and waste in the destruction of timber or removal of ores, which he might think proper to commit during his occupation of the premises.'

"The right which is given to a person or corporation by a reservation of public lands in his favor, is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But as to the Government, his right is only conditional and inchoate. By the Homestead Act (Rev. Stat. par. 2289) certain classes of persons therein specified are entitled to enter a quarter section of land subject to pre-emption at a certain price, upon making an affidavit of facts before the Register or Receiver, including in such affidavit a statement that 'his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person.' 'By a later Act adopted in 1891 (26 Stat. at L. 1098) this affidavit is now required to state that the settler will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation, necessary to acquire title to the land applied for; that he or she is not acting as the agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof or the timber thereon.'

"By Section 2291, no patent shall issue until the expiration of five years from the date of the entry, the settler being required to prove by two creditable witnesses that he has resided upon or cultivated the land for such term of five years, immediately succeeding the time of filing the affidavit, and that no part of such land has been alienated, except for certain public purposes.

"By Section 2297, if, before the expiration of the five years, the settler changes his residence or abandons the land for more than six months at any

time, the land so entered shall revert to the Government; and by Section 2301, the settler may at any time before the expiration of the five years, obtain a patent for the lands, by paying the minimum price therefor, and making proof of settlement and cultivation, as provided by law, granting pre-emption rights.

"From this resume of the Homestead Act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; second, that such property is subject to divestiture upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far and so far only, as is necessary to carry out the purposes of the Act.

"The law contemplates the possibility of his abandoning it, but he may not in the meantime, ruin its value to others, who may wish to purchase or enter it.

"With respect to the standing timber his privileges are analogous to those of a tenant for life or years."

Shiver vs. United States, 159 U. S. 491, 40 L. ED.

231.

After quoting with approval from the case of *United States vs. Cook*, 86 U. S. 19 Wall. 591, the Supreme Court said:

"Their position (the Indians) was said to be analogous to that of a tenant for life, the Government holding the title with the rights of a remainderman."

"In the courts of original jurisdiction, it has been uniformly held that a similar rule applied to homestead entries. (*United States vs. McEntee*, 23 Int. Rev. Rec. 368; *United States vs. Nelson*, 5 Sawy. 68; *The Timber Cases*, 11 Fed. Rep. 81; *United States vs. Smith*, 11 Fed. Rep. 493; *United States vs. Stores*, 14 Fed. Rep. 824; *United States vs. Yoder*, 18 Fed. Rep. 372; *United States vs. Williams*, 18 Fed. Rep. 475; *United States vs. Lane*, 19 Fed. Rep. 910; *United States vs. Freyberg*, 32 Fed. 195; *United States vs. Murphy*, 32 Fed. Rep. 376.)"

"This general consensus of opinion is entitled to great weight as authority.

"While we hold in this case that as between the United States and the settler (homestead entryman) the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, we do not wish to be understood as expressing an opinion as to whether, as between the settler and the State, it may not be deemed the property of the settler and therefore, subject to taxation.

"As the land in question continued to be the land of the United States within the meaning of Section 2461, the first question ('Whether lands duly and properly entered for a homestead, under the homestead laws of the United States are from the time of entry and pending proceedings before the land department, and until final disposition by that department, so appropriated for special purposes, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of Section 2461 of the Revised Statutes of the United States?') must be answered in the negative; and the second ('Where a citizen of the United States has made an entry upon the public lands of the United States which entry is in all respects regular, can such citizen be held liable in a criminal prosecution under Section 2461 of Section 5388 of Revised Statutes for cutting and removing after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead?') in the affirmative."

Shiver vs. U. S. 159 U. S. 491, 40 L. Ed. 231.

The railroad company suggests:

"We submit that the term 'possessory claims' used in the third section of the Act of 1875 does not relate to land held by homestead entrymen under a valid filing, but applies to those who, without any filing whatever, have been permitted by the Government to occupy portions of its vacant lands; a mere occupant, settler, or squatter, as they have been variously designated."

There is no support in the decisions of the courts for this assertion that the protection of this section is limited to

squatter's rights, but the courts agree in holding that this section applies alike to homesteads, pre-emptions, and squatter's rights, all of which are held to be possessory claims on the public lands.

Larsen vs. Navigation Co., 23 Pac. 974 (Or.).

Railroad Co. vs. Sture, 32 Minn. 95; 20 N. W. 229.

Wash. & Ida. R. R. Co. vs. Osborn, 160 U. S. 103, 40 L. Ed. 356.

Enoch vs. Spokane Falls & N. Ry. Co., 33 Pac. 966.

These cases and others of a similar nature which are referred to therein are interesting on account of the light which they throw upon the various uses of the term public land.

In each case the land in issue is held to be public land and not to be public land. First, that it is not public land to the extent that a railroad company might appropriate it without payment to the settler, but at the same time, it is public land within the meaning of Section 3 of the Act, and that the rights of the settlers are possessory claims on the public lands which the railroad company is authorized by that section to condemn, but which by the implication of the same section, it may not take without condemnation or purchase.

In conclusion, the railroad company quotes from Wash. & Ida. Ry. Co. vs. Osborn:

“On the other hand, it would not be easy to suppose that Congress would in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of the settlers.”

This quotation immediately follows the reference to the cases of Frisbie vs. Whitney and the Yosemite Valley Case in which it was held that the rights of such a settler as

Osborn are entirely inferior and subordinate to the rights of the Government itself. So that this quotation taken in this connection naturally suggests the thought; if it would not be easy to suppose that Congress intended to give the railroads a right to run the lines of their roads at pleasure, regardless of the rights of settlers, then how much more difficult would it be to suppose that Congress would intend to give them the right to run their lines at pleasure, regardless of the rights of the Government which have been held to be so far superior to those of such settlers, especially in a case where the line is being built across a Government irrigation project and may be built in such a way that the project would be largely destroyed unless the Government retains sufficient control to prevent such a result, and more especially when it is considered that this land has been previously withdrawn by the Government to accomplish this Government purpose of reclamation by irrigation and that the Government has invested millions of Government money for the reclamation thereof besides holding the title to the land itself.

The answer is found in Section 4 of the Act, which requires the filing of a profile and the approval of the Secretary of the Interior, thus giving him a wise control by which he can protect the Government property when necessary.

This closes our reply to the petition for rehearing but there are some very important issues in this case which have not yet been considered and to which we wish to again direct the attention of the court. These issues concern the nature of the Government's title to its canal system.

As to Crossings Over Government Canals.

Our understanding of the law on this subject involves two propositions:

First. The right of way reserved to the Government under the Act of Congress of August 30, 1890 (26 Stat. L. 391), is something more than a mere easement and is at least a conditional fee.

Second. That the actual occupation and use by the Government of the lands included in the Government canals was equivalent to a withdrawal under the first form of the Reclamation Act and preserves the original Government title and right of possession from the subsequent private entries just as effectively as if the land had been withdrawn under the first form of the Reclamation Act, or for an Indian or Military Reservation or any other purpose authorized by law.

As to the first point there may be some difference of opinion, but on the second point all the cases are fully agreed and the railroad company has been unable to cite a single authority in reply to the Government's contention as to the effect of the actual occupation and use by the Government prior to the entry of the private parties.

When it is shown that the Government's title to that part of the withdrawn land occupied by the canals and laterals involved in this suit, and their embankments and appurtenances, is an absolute fee simple title, it must be conceded that no railroad company may take violent possession thereof and occupy the same for its own purposes and build fences, railroad grades, bridges and other structures thereon upon a mere showing that it does not intend to obstruct the flow of the water in the ditches. Under the provisions of the Act of Congress of August 30, 1890

(26 Stat. L. 391), a right of way is reserved for ditches and canals constructed under the authority of the United States. The provision in question is as follows:

“That in all patents for lands hereafter taken up under any of the land laws of the United States or entries or claims validated by this Act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereof for ditches or canals constructed by the authority of the United States.”

Act of Congress of August 30, 1890 (26 Stat. L. 391).

Green vs. Wilhite, 14 Idaho, 238, 93 Pac. 971.

Green vs. Wilhite, 160 Fed. 755.

There has been considerable argument and some difference of opinion as to whether the right reserved to the Government by this Act is a fee or an easement. Undoubtedly there are some very strong reasons for believing that it is at least a conditional fee.

That the right of way preserved to the Government for ditches and canals constructed under its authority is a fee title appears from the construction given to the same term in other Acts of Congress. Exactly the same term is used in the Act of August 30, 1890 (26 Stat. L. 391) with respect to the right reserved to the Government for canals constructed by it as is used in the Act of March 3, 1875, with reference to the title to be conveyed to railroad companies for their construction:

“Section 1, Act of March 3, 1875 (18 Stat. L. 482), That the right of way through the public lands of the United States is hereby granted,” etc.

“Act of August 30, 1890 (26 Stat. L. 391). There is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.”

The term in each case is right of way. In the case of the Northern Pacific Railroad Company vs. Townsend, 190 U. S. 267, the Supreme Court has held that the right conveyed by this expression is a conditional fee on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. Under the well known rule of construction that all ambiguities in such statutes are to be determined in favor of the Government and against the grantee and that such grants are to be strictly construed against the grantee and reservations therein liberally construed in favor of the Government, the right reserved to the Government by the description right of way for ditches or canals constructed by the authority of the United States can not be held to reserve to the United States any less right than is conveyed to the railroad company by the same descriptive words in the act of March 3, 1875. In other words, the title of the Government to such rights of way certainly can not be held to be anything less than a conditional fee but may and probably is to be held to be something more or better than that. It is certainly a stronger title in this respect, that it is not subject to forfeiture by non-use, as is the title conveyed to the railroad company under the Railroad Act.

But in this case it is not necessary for the Government to rely on any point about which there can be any reasonable difference of opinion and therefore for the purpose of this argument we may concede that the right of way reserved by the act of August 30, 1890, is an easement as urged by our opponents and to proceed with the argument on that issue.

You may consider the Government's rights under the act of August 30, 1890, as an easement, or, if you like, may disregard the Government's rights under that act altogether, and the Government still has a fee simple estate.

All of the land occupied by the Government ditches was occupied and used by the Government and the ditches and canals actually constructed by the Government long prior to the construction of the railroad line, and in a number of cases the land occupied by the Government ditches was occupied and used by the Government prior to the entry of the settler from whom the railroad company claims title.

Such actual occupation and use by the Government preserves the original Government title to the Government just as effectively as if the land had been withdrawn under the first form of the Reclamation Act, or for an Indian, or military reservation, or any other purpose authorized by law.

For example, take the first lift main canal, some times referred to as "C canal." The stipulation in regard to this canal is that it was built under the authority of the United States under the provisions of the act of Congress of June 17, 1902 (32 Stat. L. 388), during March and April, 1908 (see paragraph 2 of the stipulation on page 87 of the transcript), and that the reclamation homestead entries referred to were made on the dates shown on the map attached to the defendant's answer herein (see paragraph 28 of the stipulation, page 96 of the transcript). The map in question shows with respect to the entry of this tract that it was made by Edward R. Guyman, homestead entry No. 03106 on July 12, 1909, and at a still later date he conveyed a right of way to the railroad company. In this case the settler's entry was made over a year after the land was occupied by the Government and the canal actually constructed.

That the original Government title is a fee simple title requires no argument; it is in fact the origin of all fee

simple titles in this country, and so far as the first lift canal is concerned, it is evident that the original title has been preserved.

“Now, that the land in question has been appropriated in point of fact, there can be no doubt for the case agreed states that it had been *used* from the year 1804 until and after the institution of this suit, as well for the purpose of a military post as for that of an Indian agency with some occasional interruption. *Now this is appropriation for that is nothing more or less than setting apart the thing for some particular use.*”

Wilcox vs. Jackson, 13 Peters 498, 512.

Scott vs. Carew, 196 U. S. 100.

It is clear that power to withdraw lands from entry was granted to the Secretary of the Interior in order to prevent appropriation by private citizens *in advance* of the actual occupation and use by the United States, but that the Government is not precluded, irrespective of an order of withdrawal from appropriating the land by actual taking of possession.

The same rule has guided the decisions of the land office.

In re Davis, 5 L. D. 376:

“Lands segregated by military occupation. Wilson Davis. The establishment and occupancy of a cantonment by the military authorities, excludes from entry, prior to the formal order of reservation, the land thus appropriated. Acting Secretary Muldrow to Commissioner Sparks, January 20, 1887.

“I have considered the appeal of Wilson Davis from the decision of your office, dated July 25, 1885, holding for cancellation his pre-emption cash entry No. 105 of the W $\frac{1}{2}$ of the NW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 6, Township 47 North, Range 8 West, N. M. Meridian, made October 2, 1883, at the Gunnison Land Office, in the State of Colorado, so far as the same conflicts with the military reserve, as shown by

the supplemental township plat approved July 15, 1884.

“The facts appear to be substantially set forth in the decision appealed from, and it is shown that the land in controversy was within the limits of the Ute Indian reservation, formerly occupied by the White River and Uncompahgre Ute Indians in Colorado, which was declared to be public land of the United States and subject to disposal for cash under existing laws, by Act of Congress, approved July 28, 1882 (22 Stat. 178).

“It appears that the township plat of survey embracing said land was filed on March 23, 1883; that Davis filed his pre-emption declaratory statement for said tracts on July 9, 1883, alleging settlement March 27, 1882, and cash certificate was issued upon his final proof on October 2, 1883. It further appears from the statement in said decision and from an inspection of the records of your office that the land in controversy was occupied by the United States military authorities in 1804 as a cantonment.

“In response to an inquiry from your office, the Secretary of War, on November 18, 1882, transmitted the report of Judge Advocate General relative to the status of the land within the late Uncompahgre reservation, reported as having been laid off by the military authorities in the Uncompahgre Valley and called the cantonment, in which it was held that by virtue of the treaties made by and between the United States and the Indians, dated October 7, 1863 (13 Stat. 673), March 2, 1868 (15 Stat. 619) and September 18, 1873, said cantonment was properly located on said Indian reservation; that, although the reservation for the cantonment was not in fact declared by the President, yet the land was in good faith legally appropriated, and therefore segregated from the public domain, and that said cantonment should be considered a military reservation, and the land embraced therein should not be considered subject to disposal as other public lands under said Act.

“The Secretary of War concurred in the views expressed by the Judge Advocate General. Your office held that the establishment of said cantonment and the occupation thereof by the military authorities, acting

under the authority of the Commander in Chief, the President, must be regarded as legal, and that the reservation must be considered as established by law, so as to exempt the lands embraced therein from entry under the pre-emption laws.

"It is urged that the formal order of the President, declaring said reservation, was not made until after Davis had made his said entry, but that can make no difference, if the land embraced in said entry was in fact included in said cantonment, and the same had been established by law and was in the actual occupation of the military authorities at the time of his said entry, the entry must be considered illegal, so far as it covers land within the limits of the cantonment.

"A careful examination of the record discloses no good reason for disturbing said decision, and it is accordingly affirmed."

In re Davis, 5 L. D. 376.

To the same effect is—

Mather vs. Hackley's Heirs, 19 L. D. 48, 52.

"By the terms of the proviso of the act of March 12, 1860, extending the provisions of the swamp land grant to the State of Minnesota, said grant is not operative as to any lands that prior to selection by the State have been reserved, sold or disposed of pursuant to any law enacted prior to said act."

"It is not necessary to constitute an Indian reservation that a treaty or act of Congress shall specifically describe the lands that are reserved. It is sufficient for such purpose if the lands occupied by the Indians are recognized by the officials of the Government as reserved Indian lands."

In re State of Minnesota, 22 L. D. 388.

"Lands which for a long period of time have been with the knowledge and acquiescence of the Government included in the site of a reservoir used as a feeder of a canal in the maintenance and operation of which the Government is interested are not 'unappropriated public lands' and are therefore not subject to the homestead entry."

In re Longnecker, 30 L. D. 186.

To the same effect is—

In re Longnecker (on review) 30 L. D. 611.

And to the same effect is a very recent case—

In re Northern Pacific Railroad, 38 L. D. 496.

The public lands actually occupied and used by the Government as an irrigation canal constructed and operated under the provisions of the Reclamation Act are appropriated by the Government, are not unappropriated public land and are therefore not subject to homestead entry nor to subsequent appropriation by a railroad company. The land is as fully reserved by the actual occupation and use of the Government as it would be if withdrawn under the first form of the Reclamation Act or under any other act for any Government purpose.

And the retention in the Government of the title to the works constructed under the Reclamation Act is expressly directed by that act:

“That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provision of this act: *Provided*, That when the payments by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.”

Sec. 6 Reclamation Act.

Until otherwise provided by Congress, the only thing which can pass from the Government under any conditions, is the management and operation of the irrigation works and that only after the payments for the major portion of the lands have been made. On this project it is agreed that no part of the cost of construction has been paid. So the Government retains the management and control of all the works as well as the title thereto and will do so for a long time to come.

It is plain that, so far at least as the first lift main canal is concerned, the Government has retained its original fee simple estate and by actual occupation and use for a purpose authorized by law has reserved it from appropriation by individuals or corporations.

The action of the railroad company in taking possession of this land and constructing bridges and fences and railroad grades and other structures thereon is a continuing trespass which can not be excused by the mere statement that the company does not intend to obstruct the flow of the water in the canal.

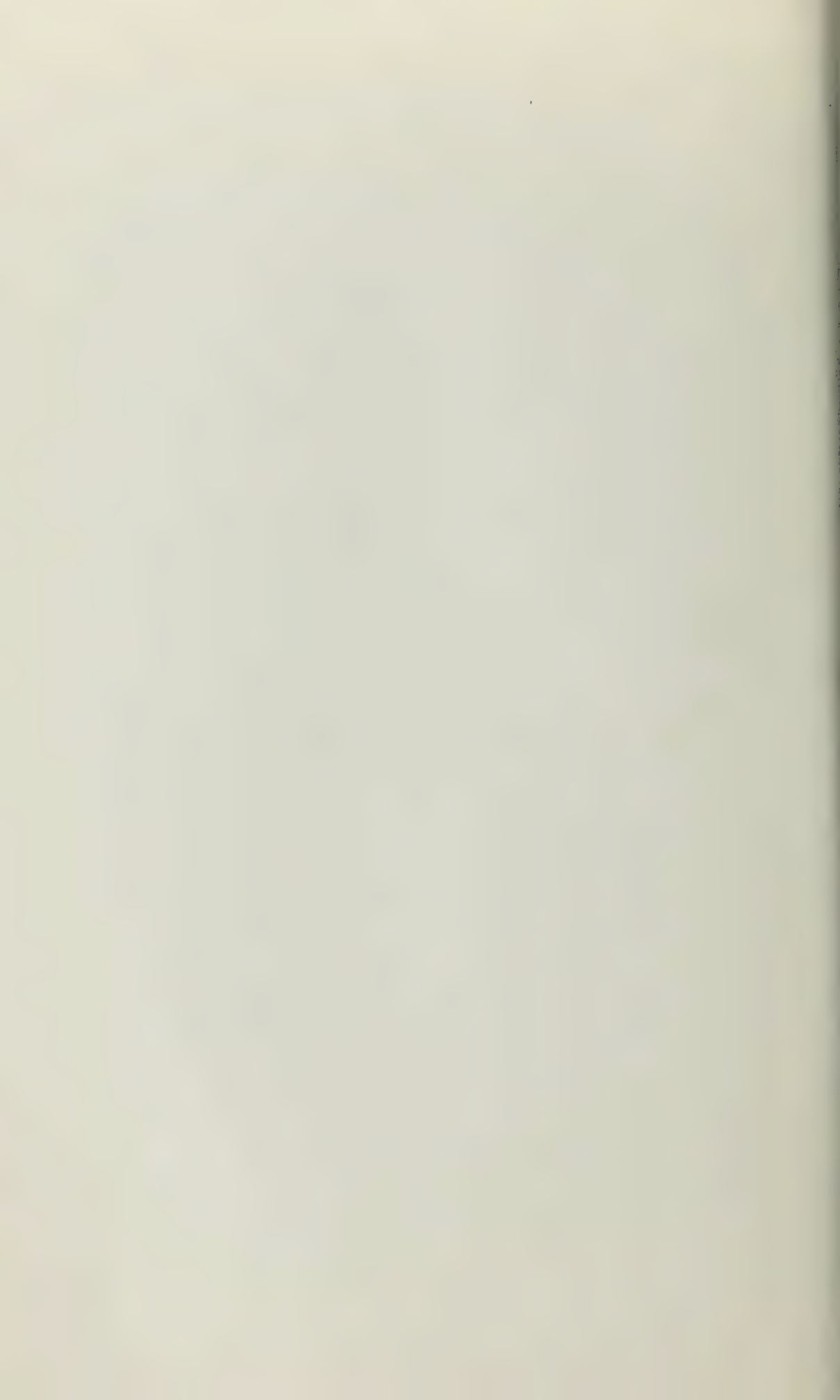
Respectfully submitted,

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U. S. Attorney.

B. E. STOUTEMYER,

Attorneys for Appellant.



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 1930

THE UNITED STATES,
Appellant,
vs.
THE MINIDOKA & SOUTHWEST-
ERN RAILROAD COMPANY, a
Corporation, and the UTAH CON-
STRUCTION COMPANY, a Cor-
poration,
Appellees.

PETITION FOR REHEARING

P. L. WILLIAMS,
D. WORTH CLARK,
Attorneys for Appellees.

Filed *1911.*

Clerk.

**In the United States Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.**

THE UNITED STATES,	}
Appellant,	
vs.	
THE MINIDOKA & SOUTHWEST- ERN RAILROAD COMPANY, a Corporation, and the UTAH CON- STRUCTION COMPANY, a Cor- poration,	}
Appellees.	

PETITION FOR REHEARING.

Now come the appellees above named in the above entitled cause, and respectfully petition the Court to recall and set aside the opinion heretofore filed, and the decree and order entered thereon, and to grant a rehearing of said cause; and, for grounds of such petition, respectfully urge that this Honorable Court has inadvertently committed error to the manifest and great prejudice of the petitioners and in the following respects, to-wit:

First. In holding that the Homestead lands involved in this suit are such public lands as are subject to the provisions of the general Right of Way Act of March 3, 1875.

Second. Assuming that they are subject to the provisions of said Act, the Court is in error in holding that it was necessary to file a profile map showing the location of the said road.

Third. In holding that the homestead settlers and entrymen on said lands had thereby nothing more than a possessory right thereto prior to the time when they shall have ^{said} for the land and for the water charges as provided in the Reclamation Act.

LANDS ENTERED AT LAND OFFICE NOT
PUBLIC LANDS SUBJECT TO ACT,
MARCH 3, 1875.

In presenting this question we call attention to the fact that in the right of way act of March 3, 1875, it is stated that a right of way through the **public lands** of the United States is hereby granted, etc. It becomes necessary, therefore, for the court to determine the meaning of the phrase "public lands" as used in this statute and we respectfully submit that this court is in error in holding that lands in the possession of homestead entrymen and upon which valid filings have been made and that still exist are public lands of the United States within the meaning of the statute. Perhaps no better statement of the effect of an entry of public lands under the Homestead Law can be given than that contained in the opinion of the Supreme Court of Minnesota in

the case of Red River and Lake of the Woods Railroad Company vs. Sture, 20 Northwestern Reporter, 229. That statement is as follows:

“It is claimed, however, that an entry under the homestead law gives the settler a vested right in the land until the issue of the patent. To this we cannot assent. We are aware that it has been authoritatively decided in *Frisbie v. Whitney*, 9 Wall. 187, and the *Yomesite Valley* case, 15 Wall. 77, that occupation and improvement on public lands with a view of pre-emption do not confer any vested right in the land as against the United States; that this is only obtained when the purchase money has been paid and the receipt of the land-office given to the purchaser. This is put upon the ground that until such time the proposed pre-emptor has merely a right to be preferred in the purchase over others, provided a sale is made by the United States. But a homsteader, after entry, occupies an entirely different position, he has in fact purchased. His entry, which is made by making and filing an affidavit and paying the sum required by law, is a contract of purchase which gives him an inchoate title to the land, which is property. This is a substantial and vested right which can only be defeated by his failure to perform the conditions annexed. It is true, no certificate or patent can be issued until the expiration of five years from the date of the entry; the United States retaining the legal title to insure performance of these conditions. But the vested right of

the settler attaches to the land at the time of his entry, and is liable to be defeated only by his own failure to comply with the requirements of the law. If he complies with these conditions he becomes invested with full ownership and the absolute right to a patent, which, when issued, relates back to the time of the entry; and under the act of May 14, 1880, (21 U. S. St. 140) his right under the entry relates back to the date of the settlement. Until forfeited by his own failure to perform the conditions of his purchase, this right of property acquired by his entry must prevail, not only against individuals, but against the government itself.”

And this holding seems to be in entire harmony with the decisions of the land department. One of the earliest cases decided by that department is the case of *Graham vs. Hastings and Dakota R. R.* 1 L. D. 362, and in that case the Secretary uses the following language:

“On the other hand, it has always been the invariable custom of the Department to regard land appropriated under the homestead law as removed from pre-emption settlement and homestead entry, and not again subject to either until the homestead entry is canceled, whereupon the land reverts to the government, and as a part of the public domain becomes subject to either.

Until after the expiration of the pe-

riod in which the settlement and improvement can be proven, the government presumes that the homestead claimant is acting in good faith, unless the contrary be shown in the manner prescribed by the statute; but until such showing a forfeiture cannot be declared.

When an entry thereof is made under those laws (whether pre-emption, homestead, or other) the particular land entered thus becomes aggregated from the mass of public lands, and takes the character of private property. ‘[In no just sense,’ observe the supreme court in *Witherspoon v. Duncan* (4 Wall. 218) ‘can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before entry, after it they are private property.’ (Opinion of the Attorney-General, 8 C. L. O., 72.)

In the light of the judicial interpretation of the term ‘entry,’ as it is used in the public land laws, I am constrained to the opinion that an entry of record, which on its face is valid, is such an appropriation of the land covered thereby as to reserve the same from the operation of any subsequent law, grant, or sale, until a forfeiture is declared and the land is restored to the public domain in the manner prescribed by law.”

Bearing in mind the rights acquired by an entryman as above explained it seems quite clear that lands so held are not public lands and that the act of

March 3, 1875, does not apply thereto. Such has been the uniform holding of the Department where approval of maps has been requested of it across entered lands.

The case of Montana Central R. R. Co., 25 L. D., 250, is so directly in point and so fully and completely covers the case at bar that we here quote the entire decision:

“The Montana Central Railroad Company has appealed from the action taken in your office letter ‘F’ of May 29, 1896, holding that the tract covered by its station plat submitted for approval under the provisions of the act of March 3, 1875 (18 Stat., 482), covering a portion of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 9, Township 8 N., Range 3 West, Helena land district, Montana, is not public land, and therefore that the plat of the station grounds is not subject to approval under said act.

The statement contained in your office letter is that the tract applied for by the company is embraced in the mineral application, No. 179, filed by Charles W. Cannon et al., April 16, 1873.

In its appeal the company admitted the existence of said mineral application, but set out that it had, under the laws of Montana, proceeded to condemn said tract to its use for station purposes in a suit against said locators, and that

the damages assessed against the said company had been paid into court.

The right of way granted by the act of 1875, *supra*, is limited to public lands; and where there are no public lands embraced within the application for right of way it has been uniformly held by this Department that an approval will not be granted.

While it appears that the company, as against the claim under said mineral application, is fully protected under the proceedings already had in the local court, its purpose in desiring the approval of its application for right of way under the act of March 3, 1875, is stated to be for the purpose of protecting it against any subsequent claimant for the land, in the event that the mineral applicants should abandon their claim.

A mineral application, while of record, is an appropriation of the tract covered thereby; and in the decision of the supreme court in the case of *The Northern Pacific Railway Company v. Sanders* (166 U. S. 621) was held to be a sufficient claim to except the lands covered thereby from the operation of the grant to said company.

It might be here stated, in view of the fact that the company in its appeal states that it has been advised that Cannon and his associates have abandoned the land in controversy, that on April 22, 1897, the receiver at Helena reported

that the mineral applicants had instituted proceedings in the local office to perfect their application, No. 179, to mineral entry, and among the papers filed is their consent to the grant of the right of way to the Montana Central Railway Co.

Upon the facts disclosed by the record, I can find no error in the holding of your office, that the tract covered by the company's plat submitted for approval is not public land within the meaning of the act of March 3, 1875, and the plat is therefore not subject to approval under said act.

As the company states in its appeal that it has entered into possession of the lands and erected thereon a water tank, round-house and other buildings necessary to the operation of its railroad, no subsequent claimant, in the event that the mineral applicants fail to perfect their claim to entry, could secure a right that will defeat them in their possession, or that would prevent the approval of its plat, if again submitted upon the cancellation of the mineral application.

See *St. P. M. and M. Ry. Co. v. Maloney et al.*, 24 L. D., 460. *Dakota Central R. R. Co. v. Downey* 8 L. D. 115.

Your office decision is accordingly affirmed."

See also:

Santa Fe Prescott R. R. Co., 22 L. D. 685.
Kem. Valley Water Co., 15 L. D. 577.

Again in Saint Paul, Minneapolis and Manitoba R. R. Co. 29 L. D. 18, a regulation is promulgated as follows:

“If it does not appear that some portion of the public land would be affected by the approval of the maps, they will be returned advising the applicant of that fact.”

These holdings of the land department that entered land is not public land subject to the provisions of the Right of Way Act of March 3, 1875, and that no right of way can be acquired thereover by the filing of a map are in harmony with, and are sustained by, the decisions of the courts.

We invite your Honors' attention to the case of the Union Pacific Railroad Company vs. Harris, decided by the Supreme Court of Kansas, July 5, 1907, and reported in 91 Pacific Reporter, page 68. The grant of right of way to the railroad in this instance, so far as this question is involved, it is submitted is precisely the same as under the language of the Act of 1875 here involved. The court in that case says:

“In construing railroad land grants the words ‘public lands’ are treated not as designating all lands which are public in the sense that the Government owns them and, technically speaking, may dispose of them as it sees fit, but as excluding at least every tract to which an indi-

vidual has acquired under the settlement laws a valid claim that may ultimately ripen into a title, although no vested right has accrued to him at the time. This rule of construction has been definitely adopted by the federal Supreme Court.”

Citing and reviewing numerous cases in that court which very clearly sustain the statement above quoted. The decision in this case was affirmed by the Supreme Court of the United States, and is reported in 215 U. S., page 386.

In *Bardon v. N. P. Ry. Co.*, 145 U. S., 535, the court, after quoting the law involved in that case and which made a grant of “public lands,” and stating the facts in connection with it, uses the following language, at page 538:

“It is thus seen that, when the grant to the Northern Pacific Railroad Company was made, on the 2d of July, 1864, the premises in controversy had been taken up on the pre-emption claim of Robinson, and that the pre-emption entry made was uncanceled; that by such pre-emption entry the land was not at the time a part of the public lands; and that no interest therein passed to that company.”

In *Hastings & Dakota Railroad Co. v. Whitney*, 132 U. S. 357, the court, at page 361, quotes, with approval, the declaration in *Witherspoon v. Duncan*, 4 Wallace 210, that lands originally public, cease to

be public after they have been entered at the land office and a certificate of entry has been obtained; and further declared that this applies as well to Homestead and Pre-emption entries as to cash entries. That, in either case, the entry being made and the certificate being executed and delivered, the particular land entered thereby becomes segregated from the mass of public lands and takes the character of private property. And, at page 363, after stating what action is requisite to constitute an entry under the Homestead Laws, follows on page 364 by using the following language:

“So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and, therefore, precludes it from subsequent grants.”

If the foregoing statement of law is a correct one, then it seems clear that when a homestead entryman has made a valid entry as required by law upon a portion of the public domain, that as long as he retains the possession of the land and complies with the conditions of the Homestead Act there is no power in any individual or in the Government itself to dispossess him, so long as he complies with the requirements of the law. He has an interest in the land. It is not public land to the extent that

the Government of the United States can take it away from him, and the Government cannot dispossess him unless on account of some reservation contained in the law under and pursuant to which the entryman filed upon the land, or by a failure on his part, to perform the conditions required by law to perfect his title. Therefore, we may safely assume that if the entryman himself desires to build a railroad from one corner of his land to the other there would be no power resting in the government to prevent it. If the entryman should desire to construct a school-house upon his land and permit the children of the neighborhood to attend school there, there would be no power in the government to prevent it. If the entryman desired to allow his neighbor to conduct water through a ditch across this tract of land, there would be no power in the government to prevent it. In other words, the entryman has the right to exclusive possession of the land. Recognizing this right of possession and this interest which the entryman has, the Congress of the United States provided a method whereby the homestead entryman might dispose of this right of possession for certain purposes, among which is included the right of way of a railroad. Now in this case when this railroad is being constructed under a right of possession granted by the entryman himself, the United States asks the court to intervene and deny to the railroad company the right of possession, unless it complies with the Act of March 3, 1875. In other words, while

such compliance would secure to it no right whatever as to such land, the court is asked to hold that the settler or homestead entryman cannot put any person in possession of any portion of his tract of land without the consent of the Government, specially granted in each instance, and notwithstanding the general law quoted in the opinion of the Court in this case (Sec. 2288, Rev. Stats.) authorizing the entrymen to do the exact thing they have done, viz.: to grant the right of way to the Railroad Company through their respective entries. The logical effect of this decision is to hold that the settler could not grant a right to construct a schoolhouse upon his land until he had first satisfied the United States. That the settler could not grant the right to one of his neighbors to construct a ditch on the land until he had first satisfied the United States, and the logical result of all this would be that the homestead entryman himself could not do any building on the land unless the United States granted him such special permission.

And now we desire to call attention to the position we find ourselves in if this court adheres to the opinion filed. This court says to us, you must file your map, and secure its approval because the land is public land. the Government says we will not accept the map or approve it because the land is not public land.

In concluding the discussion of this branch of the case we invite the attention of the Court to a de-

cision of the Supreme Court of Utah in the case of the Oregon Short Line Railroad Company v. Fisher et al., 72 Pac. Rep. 931. The facts in this case are particularly illuminating on the point here involved, and the syllabus of the Court as reported is completely supported by the reasoning and language of the court in its opinion, and is as follows:

“A grant to a railroad company by Act of Congress of a right of way over public lands does not include lands which, at the time of the grant, are subject to an existing, uncanceled homestead entry.”

IF MAP COULD HAVE BEEN FILED AND APPROVED, NOT NECESSARY IN THIS CASE.

We desire to again urge upon the court our understanding of the law that it is not necessary to file a map in accordance with the provisions of Section 4 of the Act of March 3, 1875, in cases where the railroad company has placed itself in such a position as to become specifically a grantee under the Act and has in addition to placing itself in that position actually constructed its road upon the ground. The first interpretation of this statute on this point seems to have been by the land department, and the opinion filed is entirely clear. The case referred to is the case of Dakota Central Railroad vs. Downey, 8 L. D., 115. We quote from this decision at length, as follows:

“This case involves a consideration of the act of March 3, 1875, granting to railroads the right of way through the public lands of the United States; and the difficulty is, to determine the extent to which the fourth section of the act is to be applied as a qualification of or limitation upon the present grant contained in the first section. It is obvious that the first section is a present grant. The language used is such as has repeatedly been declared by the supreme court to operate a present grant by Congress. This interpretation has been applied to grants of lands for right-of-way, of lands to aid in the construction of railroads, wagonroads, and canals, and to the swamp land grant to the states by the acts of 1849 and 1850. The cases of *Railroad Company v. Baldwin* (103 U. S., 429), the *Central Pacific Railroad Company v. Dyer* (1 Sawyer, 641), and the *Central Pacific Railroad Company v. Benity* (5 Sawyer, 118), are illustrations of the application of this rule of interpretation to grants of rights-of-way to railroads.

But it will be noticed that there is one point of difference between the present grant of this act and those where a single grantee, as a State or a railroad company is named. In this grant, not only is the land indefinite in location, and therefore a float—in the language sometimes employed with respect to grants of land to aid in the construction of railroads or otherwise—but the particular corporation is indefinite and uncertain. In order, then, to make this grant attach, it is necessary to provide fixity of grantee, as well as fix-

ity of location upon the ground. To determine what company shall be considered as a grantee or beneficiary under this act, the first section provides simply that it shall be 'any railroad company organized under the laws of any State or Territory * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporations, and due proofs of its organization under the same.' Immediately, therefore, upon the filing of these two documents, the company stands in the attitude of being named in the act, as entitled to its benefits, so far as the grantee is concerned—I think no farther; and that thereafter its relation is the same as that of the State, or the particular railroad company, to which, by similar acts grants of lands have been made for such purpose.

There must remain afterwards the necessity, in order to define the subject granted, to give fixity of location to the land. The same rule ought to determine the time when the grant becomes attached to particular land, which has been declared by the supreme court in respect to other cases of grants of floats. The act fixes this. It declares, in the first section, defining the present grant, that the company has granted to it the right of way, 'to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth stone, and timber necessary for the construction of said railroad; also ground adjacent to such right-of-way for station buildings, depots, machine-shops, side-tracks, turn-outs, and

water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.' As to the roadway, the construction of the road fixes the boundaries of the grant, and fixes it by the exact rule of the statute. As to the grounds for station buildings, etc., the right is absolute to the quantity named, for one station to each ten miles of the road. (Perhaps the approval of the Department is necessary to its specific definition; but that needs not to be now decided.) This must undoubtedly be the rule when the road is constructed over unsurveyed lands, because then every condition necessary to the vigor of the present grant is complied with. The fact that the railroad company may locate and construct its road upon unsurveyed lands is clearly recognized in the fourth section of the act; and the regulations of the Department have been made to apply to such cases, and authorizes such construction.

It seems to me that the fourth section of the act was written for another purpose and for another case. It relates to the case of a railroad company which desires to secure the present grant, and give to it fixity of location, before its roads shall be constructed; and it is designed to provide a similar privilege in respect to rights of way which acts granting lands to aid in the construction of railroads have provided—namely, the privilege of giving fixity of location to the subject of the grant before construction of the road. Thus it begins by stating that it relates to the case of 'any railroad company de-

siring to secure the benefit of this act.' Evidently, this language is used of a company which contemplates building a road, and it speaks of the filing of a profile of its road, as a thing to precede the construction. The proviso to this section also clearly indicates that the section was designed to relate to cases where the railroad company seeks to secure the definite location of its right-of-way before building; and it indicates a period of five years within which the company, after having secured its right-of-way, may build; but upon failing to do it the right-of-way shall be forfeited. It contemplates, first, the 'location' of the line of the road—authorizing it to be done in sections of twenty miles each. This 'location' must mean the determination by the corporation, through its stockholders or board of directors, of the projected line upon which it purposes to construct the road. That 'location' must precede construction; and it must also precede the filing of a profile, which is only another phrase for a map of definite location—a phrase frequently used in acts granting lands in aid of the construction of railroads. Then it is provided that, if the location be upon surveyed lands of the United States, this profile must be filed with and approved by the Secretary of the Interior, as the center line of the road; and being filed in the office of the register of the land office of the district where the public land is located, it is enacted that 'thereafter all such lands, over which such right-of-way shall pass, shall be disposed of subject to such right-of-way.' If, however, the railroad company has located its road upon

unsurveyed lands, but not constructed it, then, within twelve months after the survey by the United States, the profile of the road must be filed in like manner; and from that time the clause above quoted applies—‘land over which such right-of-way shall pass, shall be disposed of subject’ to it. It seems to me clear that the purpose of Congress in this 4th section was only to provide means by which railroads could define, or definitely locate, the right-of-way, of two hundred feet in width, with station grounds, etc., desired for the road which was to be thereafter constructed; and, that, as in the case of other grants or ‘floats,’ the right of the grantee, in its relations to settlers on the public lands attached from the date of filing the map of definite location.

But inasmuch as it is obvious that the railroad company has a perfect right to build upon unsurveyed lands, and that the construction of its road then fixes the exact line, from which the right-of-way is to be measured, in cases where a road has been constructed in fact, through unsurveyed land, its right is as perfect to the right-of-way defined by this statute, by measurement from its center line, as it is possible for it to be. The grant is complete, and defined in fact.

It does not become necessary for a road which has secured the benefits of this act, by taking the steps which give it the attitude of being named in the first section as a grantee, and by building a road through the public lands, whereby the subject of the grant has been defined, to

file a map of definite location in order to entitle it to the benefits of the right-of-way.

The fourth section is designed to provide a mode by which fixity of location can be secured to a grantee, in anticipation of that construction by which location is defined in the section making the grant, and which shall have the effect, before the construction of the road, which the terms of the grant limit to 'the central line of said road;' which only means—without the fourth section—a constructed road."

There is no ambiguity in this decision and in the case of *Jamestown & Northern Railroad Company v. Jones*, the Supreme Court of the United States expressly approved it and in addition to approving it expressly reiterated the doctrine therein contained after citing it. It must be borne in mind as stated by Secretary Vilas that the fourth section of the Act was written for an entirely different purpose, that is, for the purpose of giving the road fixity of location before construction. The fourth section seems to have no other purpose than to provide for notice to the government and to other occupants of public lands of the claim of the railroad company to the right of way. In other words, it is our contention that if the land is such land as is subject to the provisions of the Act of March 3, 1875, and the railroad company has filed its articles of incorporation and due proof and constructed its road, it is not within the power of the Secretary of the Interior to with-

hold from it the right of way. Therefore, in the present case if we had filed a map as provided by section four and such map was in proper form and filed in accordance with the provisions of the statute, and it affected “public lands,” the Secretary could not have refused his approval, because he acts in a judicial capacity to the extent only, of passing upon the form of the filing and the question of whether the land is such land as is subject to the provisions of the act. This court has held that the land was such land at the date of the commencement of this suit as was subject to the provisions of the Act of March 3, 1875, therefore, the filing of a map was a mere formality because the railroad company was in such a position as to be able to take under the provisions of the act, because it had filed its Articles of Incorporation and due proof of its organization. Therefore, if a map is required it seems quite certain that the Secretary could not refuse his approval of such map and if he did so refuse his approval it would be an arbitrary action on his part, and, therefore, would not be of any validity. It seems clear to us, therefore, that Section 4 was enacted in order to give notice and for no other purpose, and when a company has constructed its road and by virtue of that fact has given notice, then the decision in *Jamestown, Northern Railroad Company v. Jones* applies.

In your opinion your Honors refer to the case of *M. & St. P. etc. Ry Co. v. Doughty*, 208 U. S. 251. In that case it was claimed by the railroad company

that the location and staking of its line was sufficient as against the filing of a Homestead entry after such location and staking and before the construction of the road was even begun, so far as the case discloses. This case in no way modifies the Jamestown case, in case of actual construction of the road without the filing of a map, because that construction is unmistakable evidence of notice of appropriation. We submit that the construction of a grade of a railroad is equally an unmistakable evidence, and evidence of appropriation, as though the ties and rails were laid and trains were being operated. In this case, the evidence shows record (111 Testimony of Engineer Robinson) that prior to the time this suit was begun a portion of the grade had been constructed; that such grading began in the year 1909, but he stated on direct examination that he could not recall from memory what portion of the grade had been constructed at the time the suit was begun, but, at the time he was testifying—which was upon the final hearing of the case on June 18, 1910,—the grading was completed (See record 113). It does not show how long prior to that date it had been completed; so that we submit the evidence shows, without contradiction, that there was such permanent work done in the way of constructing the road as operated to give notice of an appropriation of the line along which the grade was being constructed at the time the suit was begun and which had been completed at the time of the hearing in the court below.

In addition to this, we desire to respectfully urge that in view of the position taken by this court, the Government would not be entitled to an injunction, even though the law is as announced. This court finds that the land was such land as was subject to the provisions of the Act of March 3, 1875. This court in addition to that has before it a record which shows that the railroad company is entitled to take advantage of the provisions of this Act.

Therefore, the only thing necessary for this company to do in order to fully meet the requirements made by the court is to file its map and it is apparent from the record in this case that if such map were filed and the Secretary followed the plain mandate of the law, as laid down by your Honors, he would be compelled to approve it and thereby the right of way would pass to the company. Therefore, it seems plain that the Government is insisting upon a mere technical legal right and one which would not entitle them to come into a court of equity and enjoin the construction of a railroad enterprise of this kind. Under the decision of the court in this case what possible equity has the Government? The Congress of the United States has said that it would freely grant rights of way to public lands of the United States under certain conditions. This court has held that the land over which this road passes is public land of the United States subject to the provisions of the Act and that this railroad company is qualified to take the right of way. It appears that the railroad

company has in good faith purchased from the entrymen a right of way across their lands and now it is proposed to enjoin the railroad company from constructing its road across these lands merely because no map has been filed although the filing of such map is a mere formality. It seems that in any event the judgment of the court ought to be modified to such an extent that the injunction will only be issued if the company fails to file the map required within a reasonable time to be fixed by the court, and that the filing of the map should be sufficient evidence to justify the court in refusing to grant the injunction.

With reference to the position taken by your Honors regarding the necessity of filing the map, and that the map required by the Act is denominated a "profile:" we admit the definition which the court gives of a profile is unquestionably correct in a strict and technical sense; and yet, it is proper to state that in the thirty-six years since the passage of the Act of 1875, the Department has never required anything but an alignment map which represents merely the location of the line upon the ground. It will be noted in the opinion of the Secretary Vilas, 8 L. D. 115, from which we have above quoted at length, he remarks "that a 'location' must precede construction; and it must also precede the filing of a profile, which is only another phrase for a map of definite location—a phrase frequently used in acts granting lands in aid of the construction of railroads."

The regulations issued under the Act of 1875 have been revised from time to time and, quoting from the same as approved February 11, 1904, Regulation 6, we find: "The word profile, as used in this Act, is understood to intend a map of alignment;" and this same language is contained in several earlier issues of the regulations under this Act; and, indeed, according to our information, this definition has always been given from the time when the first instructions were issued under this Act, and this construction so long adopted by the Department, having in charge the administration of this law, should surely be entitled to great weight.

We further submit that considering all of the provisions of Section 4, that it was a map of definite location which Congress itself had in mind, because of the purpose and object of requiring a map to be filed, for the section further provides: "and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." So that, it would seem that it was a map of the right of way that the Legislature had in mind, and the purposes of filing it and noting upon plats is that the plats shall show the sub-divisions of the public land over which the line is located. In other words, the noting of the line upon the plats in the office gives notice to the public in the subsequent

entries of land of the existence of the right of way of the railroad.

THE RIGHTS OF HOMESTEAD ENTRYMEN ARE MORE THAN A MERE POSSESSION.

It seems clear to us, both upon consideration of the statute and the decisions of the courts, that the rights of a valid homestead entryman amounts to something more than mere "possessory claim" on the public lands. As stated in the opinion cited from the 20 N. W. Rep., that a homestead entry is under the provisions of the law made by making and filing an affidavit and paying the sum required by law, and that this constitutes a contract of purchase which gives the entrymen an inchoate title to the land, and that this interest is property. It is true under the Homestead Law conditions subsequent are to be performed by the entryman, after he has thus originated his entry, but if he performs those conditions he is then entitled to have his title evidenced by a patent. As stated in that case, when he has made his filing and paid the fees required, he has acquired a substantial right which can only be defeated by his failure to perform the conditions annexed; that it is true that no certificate or patent can be issued until the expiration of five years from the date of the entry, the Government retaining the legal title to insure performance of these conditions. We submit that this is a very clear statement of the rights of the

homestead entrymen under the law as it applies generally. It is true that in areas reclaimed under the Reclamation Act there are certain additional burdens laid upon the homestead entryman; as, for instance, he must reclaim by irrigation before he can have a patent at least one-half of his entry, and he must pay the amount per acre for his permanent water rights, which in the discretion of the Department may be extended over a period of ten years. But, the entrymen in these particular cases, having taken the initial steps by filing their affidavit, paying the fees required, and regularly becoming entrymen, if they shall perform all the conditions annexed to their entry they will be entitled to have a patent to the lands entered. All Acts of Congress providing means of disposing of vacant lands of the Government are in the nature of contracts obligating the Government to grant the individual a patent whenever he has complied with the provisions of the law in the particular case. When an individual in good faith initiates a claim by settlement, occupation and improvements, and complies with the requirements of the law as to making and perfecting his filings, he thereby acquires an inchoate right which he is entitled to have ripen into a perfect title whenever he has completed his period of residence, amount of cultivation or other specific requirement of the law. In these cases, amongst other requirements, is that the Government shall be reimbursed the expense incurred in providing the irrigation works and supplying the water for

the reclamation of these lands; and the title is withheld by the Government until all these conditions are performed by the entryman. The act of these entrymen in granting the right of way as authorized by law to the railroad company over their respective entries, does not relieve the entrymen from the necessity of complying with all the conditions before patent is obtained, and they must pay the amount of money required to reimburse the Government for the water provided for irrigating their respective tracts; and the Government by withholding the patent retains the title to these lands to their entire extent, including the right of way granted to the railroad by the entrymen until all conditions are complied with. There is no contention made, nor can it be successfully made, that the conveyance of these rights of way to the railroad company can withdraw the lands so conveyed from the lien of the Government to secure the reimbursement for its expenditure as required by the law. We submit that the term "possessory claims" used in the third section of the Act of 1875 does not relate to land held by homestead entrymen under a valid filing, but applies to those who without any filing whatever have been permitted by the Government to occupy portions of its vacant lands, a mere occupant, settler, or squatter, as they have been variously designated. It was not the purpose of Congress that a railroad company should interfere with such possession under a grant of this nature without compensating such possessory claimant

for the interference with his possession or his improvement. It was such persons that it was intended to protect by that provision of the law in connection with the use of the term “possessory claims on the lands of the United States.” They require such protection; the homestead entrymen did not. For the reason that his entry protected him against the encroachment of a railroad company, and because he had such right to prevent encroachments, Congress passed the Act authorizing the entryman—voluntarily, if he chose—to grant a right of way to a railroad across his entry. This construction and purpose of the provision is made clear by the decision of the United States Supreme Court in the case of *Washington & Idaho Railroad v. Osborn*, reported in 160 U. S. at page 103. This case arose upon the attempt of the railroad company to maintain its right under the Act of 1875 across a portion of the unsurveyed public lands of the United States which were at the time in the actual possession of, and upon which improvements had been made by, the settler, but as to which land he had made no filing of any kind whatever. The court in its opinion in that case maintains the doctrine that by the mere occupation and improvement of these lands no right accrued to the settler, (he having taken no steps under the law to secure title) that would preclude the Government from dispossessing him or otherwise dealing with the land he occupied as the absolute owner; but, while maintaining this doctrine in harmony with the cases of

Frisbie v. Whitney, the Yosemite Valley case, and many other cases decided in that court, the opinion proceeds:

“On the other hand, it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers. Accordingly, when we examine the Act of March 3, 1875, upon which the plaintiff rests its claim of right to appropriate to its use, without compensation, the land and improvements of Osborn, we find, in the third section, an expressed provision saving the rights of settlers in possession;”

and then quotes the provision of the third section of the Act. And so, the court affirmed the judgment of the Supreme Court of the Territory of Idaho holding that in such case such settler being in possession of a portion of the public domain, but without having taken any step to secure a title, was protected by this provision of the law, and that he was entitled to compensation for the injury done his possessory claim by taking a portion of it for the right of way of the railroad.

Very respectfully submitted,

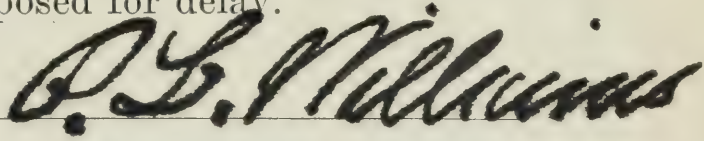
P. L. WILLIAMS,

D. WORTH CLARK,

Solicitors for Appellees.

I, the undersigned, one of the attorneys for the appellees in the above entitled cause, hereby certify

that in my opinion and judgment the above petition for rehearing is well founded in point of law, and that it is not interposed for delay.

A handwritten signature in dark ink, reading "P. B. Williams". The signature is written in a cursive style with a horizontal line underneath it.

Solicitor for Appellees.

12. 1. 1880

No. 1937

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW, by G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor, and ORVILLE D. TOWN-
SEND, THE UNITED STATES OF AMERICA,
Trustee, and E. L. SWARTZLANDER,

Appellants,

vs.

LOUISE COLFAX,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court
for the District of Oregon.

FILED
FEB 8 - 1911

No. 1937

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW, by G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor, and ORVILLE D. TOWN-
SEND, THE UNITED STATES OF AMERICA,
Trustee, and E. L. SWARTZLANDER,

Appellants,

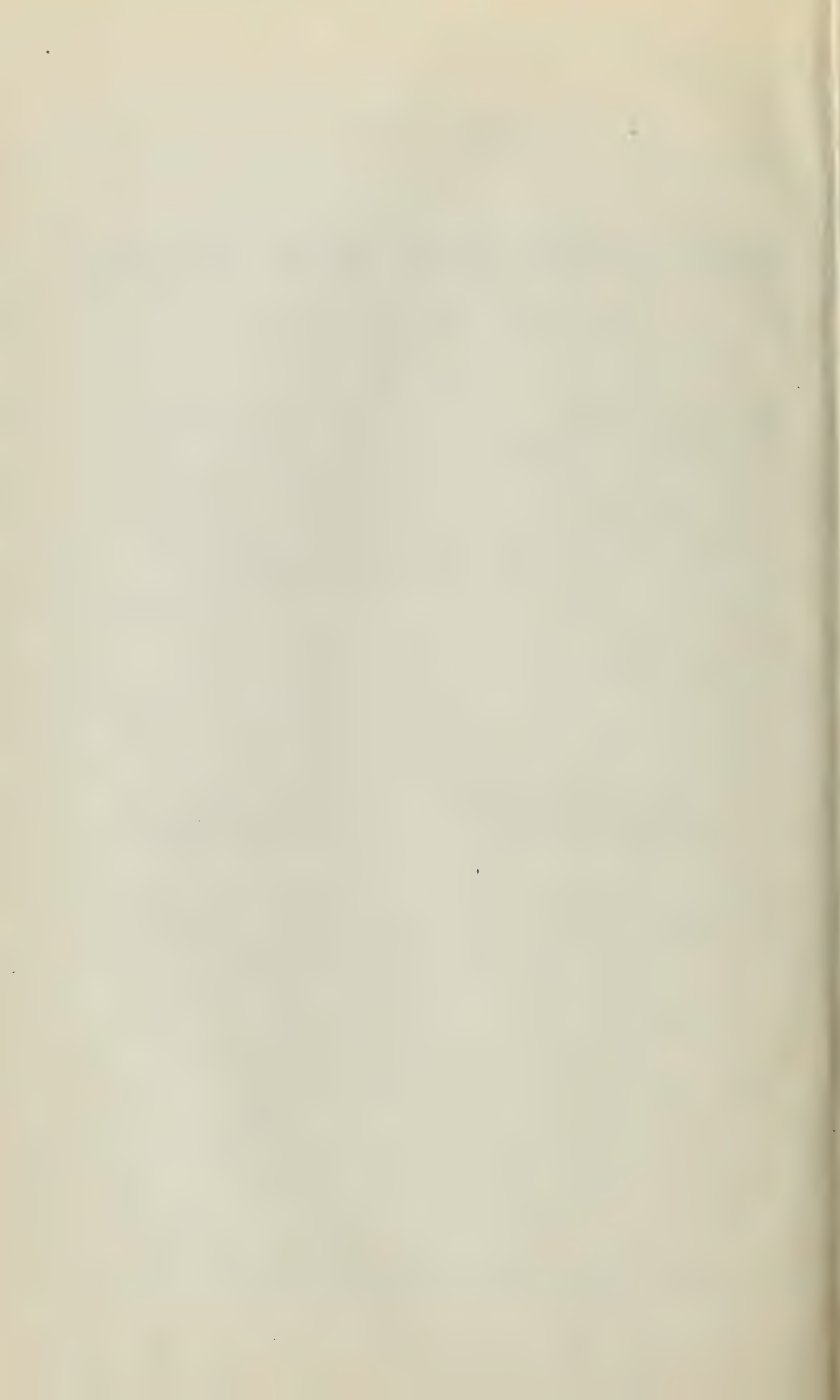
vs.

LOUISE COLFAX,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court
for the District of Oregon.



INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

MAGGIE ELLEN PARR et al.,

Appellants,

vs.

LOUISE COLFAX,

Appellee.

Names and Addresses of Attorneys of Record.

S. A. LOWELL and J. P. WINTER, of Pendleton, Oregon, and JOHN McCOURT, United States Attorney, Portland, Oregon, for Appellants.

JAMES A. FEE and R. J. SLATER, Pendleton, Oregon, for Appellee.

*In the Circuit Court of the United States for the
District of Oregon.*

MAGGIE ELLEN PARR, JULIA AGNES PARR, EZRA WALLACE FARROW, by G. G. LEE, Next Friend of the Said EZRA WALLACE FARROW, a Minor,

Plaintiffs,

vs.

LOUISE COLFAX, ORVILLE D. TOWNSEND, E. L. SWARTZLANDER and THE UNITED STATES OF AMERICA, Trustee,

Defendants.

Citation on Appeal [Original].

United States of America,
District of Oregon,—ss.

To Louise Colfax and to James A. Fee and R. J.
Slater, Her Attorneys, Greeting:

Whereas, Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow by G. G. Lee, next friend of the said Ezra Wallace Farrow, a minor, the above-named plaintiffs and Orville D. Townsend, the United States of America, Trustee, and E. L. Swartzlander, defendants above named, have lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree rendered in the Circuit Court of the United States for the District of Oregon in your favor, and have given the security required by law, you are therefore hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the said Ninth Circuit, at the city of San Francisco in said Circuit, on the 7 day of January, 1911, to do and receive what may pertain to justice to be done in the premises.

Given under my hand and seal in the City of Portland in the Ninth Circuit, this 10th day of December, 1910.

CHAS. E. WOLVERTON,

Judge of the District Court of the United States for
the District of Oregon.

United States of America,
District of Oregon,—ss.

Due service of the within citation by certified copy thereof, as required by law, is hereby acknowledged at Pendleton, Oregon, this 12th day of December, 1910.

JAMES A. FEE and
R. J. SLATER,
Attorney for Louise Colfax, One of the Above-named
Defendants.

[Endorsed]: No. 3156. In the Circuit Court of the United States for the District of Oregon. Maggie Ellen Parr et al., Plaintiffs, vs. Louise Colfax et al., Defendants. Citation on Appeal. Filed December 13, 1910. G. H. Marsh, Clerk.

*In the Circuit Court of the United States for the
District of Oregon.*

April Term 1907.

Be it remembered, That on the 4th day of June, 1907, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the
District of Oregon.*

ROSA PARR,

Plaintiff,

vs.

UNITED STATES OF AMERICA, Trustee,
Defendant.

Complaint.

To the Honorable CHARLES E. WOLVERTON,
Judge of the Circuit Court of the United States
for the District of Oregon:

Rosa Parr of Umatilla County, State of Oregon,
a mixed blood Indian woman residing upon the
Umatilla Indian Reservation in said County and
State, brings this, her bill of complaint against the
United States of America, as trustee for the heirs
of Isaac Gober, deceased, mixed blood Walla Walla
allottee No. 285 on said reservation, and therefore
your oratrix complains and alleges:

I.

That under and pursuant to an Act of Congress of
the United States of America entitled "An Act to
provide for the allotment of lands in severalty to the
Indians residing upon the Umatilla Indian Reserva-
tion, granting patents therefor and for other pur-
poses," approved March 3d, 1885, the following
described lands upon the Umatilla Indian Reserva-
tion in the State of Oregon, to wit: The South half
of the Southwest quarter of Section Twenty-three
(23), in Township Three (3), North, Range Thirty-
four (34) East of the Willamette Meridian, con-
taining eighty (80) acres, were allotted to Isaac
Gober, mixed blood Walla Walla allottee No. 285,
which said allotment was accepted by said Gober,
and thereafter a trust patent was issued therefor, as
provided in said Act of Congress.

II.

That on or about the 24th day of November, 1899,

after said allotment, said Isaac Gober died intestate, unmarried, and without issue, leaving surviving him no lineal descendants, nor father nor mother, nor brother, nor sister, except your complainant, Rosa Parr, the sole and only sister of said Isaac Gober.

III.

That by virtue of said Act of Congress and the laws of the State of Oregon, this complainant was and is the sole and only heir at law of said Isaac Gober, deceased, and that the title to said land so allotted to him immediately vested in her, upon his death, and this plaintiff ever since his death has been and now is the owner of and entitled to the immediate possession of all of said lands and the rents, issues and profits thereof, and that said defendant unlawfully denies the right of plaintiff to said allotment, and is unlawfully excluding her from the same.

To the end therefore that your oratrix have that relief that can only be obtained in a court of equity, and that the said defendant may answer the premises, but not under oath or affirmation, benefit whereof is expressly waived, she now prays the Court for a decree declaring her to be the sole and only heir at law of said Isaac Gober, deceased, and as such the owner of and entitled to the immediate possession of said lands so allotted to him, as hereinbefore described, and to all of the rents, issues and profits thereof since his death, and that she be placed in possession of said lands, and recover her costs and disbursements of this suit, and for such other and further relief in the premises as to equity may seem

meet and proper. And may it please your Honor to grant to your oratrix a writ of subpoena to be directed to the defendant herein, commanding it at a certain time to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, to stand, perform and abide by such orders, directions and decrees as may be made against it in the premises as shall seem meet and agreeable to equity, and your oratrix will ever pray.

CHAMBERLAIN, THOMAS & HAILEY,
Solicitors for Complainant.

State of Oregon,
County of Umatilla,—ss.

I, Rosa Parr, being first duly sworn, say that I am the oratrix named in the foregoing entitled suit, and that the facts stated in the foregoing bill of complaint are true, as I verily believe.

ROSA PARR.

Subscribed and sworn to before me this 31st day of April, 1907.

[Seal]

DAN P. SMYTHE,
Notary Public for Oregon.

My commission expires September 25th, 1907.

Complaint. Filed June 4, 1907. J. A. Sladen,
Clerk. By G. H. Marsh, Deputy.

And afterwards, to wit, on the 25th day of November, 1907, there was duly filed in said court, an Answer, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

ROSA PARR,

Plaintiff,

vs.

UNITED STATES OF AMERICA, Trustee,
Defendant.

Answer.

Comes now the defendant in the above-entitled cause, and makes this, its answer to the bill of complaint filed in the above-entitled cause, and now and at all times hereafter saving to itself any and all manner of benefits of exceptions or otherwise than can or may be taken to the many errors, uncertainties and imperfections in said bill of complaint contained, and for answer thereto or so much thereof as said defendant is advised is material or necessary for it to make answer to, answering says:

I.

Admits all of the allegations contained in paragraph I of said bill of complaint.

II.

Denies all of the allegations contained in paragraph II of said bill of complaint.

III.

Denies all of the allegations contained in paragraph III of said bill of complaint.

Wherefore, having fully answered, traversed and avoided or denied all matters in said bill of complaint material to this answer according to its best knowledge and belief, this defendant humbly prays this Honorable Court to enter its decree herein dismissing said bill of complaint and awarding to this defendant its costs and charges in this behalf expended and for such further and other relief in the premises to be granted as to this Honorable Court shall seem meet and in accordance with equity.

JAMES COLE,

Assistant United States Attorney.

Due, legal and timely service of the foregoing answer, by copy duly certified to by James Cole, Assistant United States Attorney for the District of Oregon, is hereby admitted at Portland, Oregon, this 22 day of Nov., 1907.

F. G. HAILEY,

Atty. for Complainant.

Answer. Filed Nov. 25, 1907. J. A. Sladen, Clerk. By G. H. Marsh, Deputy.

And afterwards, to wit, on the 7th day of April, 1910, there was duly filed in said court, a Motion to make E. L. Swartzlander, Superintendent, Umatilla Indian Reservation, a party defendant, and affidavit of S. A. Lowell, in support of motion, in words and figures as follows, to wit:

[Affidavit of Stephen A. Lowell.]

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3156.

ROSA PARR,

Plaintiffs,

vs.

THE UNITED STATES, Trustee, et al.,

Defendants.

State of Oregon,

County of Umatilla,—ss.

I, Stephen A. Lowell being first duly sworn say I am one of the attorneys for the above-named plaintiff and that since the filing of the bill of complaint herein E. L. Swartzlander has become and is now duly appointed, qualified and acting superintendent and special disbursing agent of the United States for the Umatilla Indian Reservation upon which the lands described in the complaint are situated and that as such agent the said E. L. Swartzlander is in control of said lands and has collected and retained in his possession the sum of \$696.75 which has accrued from the rents of said land.

That the parties interested as defendants herein are poor persons and have no money or means with which to pay the expenses of this litigation excepting from the moneys accruing from the rents of said land.

That by reason of the above facts the said E. L.

Swartzlander is a necessary party defendant in this cause.

STEPHEN A. LOWELL.

Subscribed and sworn to before me this 7 day of April, 1910.

[Seal]

J. S. BECKWITH,

Notary Public for Oregon.

[Motion to Make E. A. Swartzlander a Party Defendant.]

*In the Circuit Court of the United States for the
District of Oregon.*

ROSA PARR,

Plaintiffs,

vs.

THE UNITED STATES, Trustee, et al.,

Defendants.

Based upon the affidavit of Stephen A. Lowell filed herewith comes now the plaintiff in the above-entitled suit and moves this Court for an order making the said E. L. Swartzlander, referred to in said affidavit, a party defendant herein.

S. A. LOWELL,

Solicitors for Plaintiff

Motion to make E. L. Swartzlander defendant and affidavit. Filed April 7, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 7th day of April, 1910, the same being the 3rd judicial day of the regular Pendleton, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

**[Order Making E. L. Swartzlander a Defendant,
and Re Answer.]**

*In the Circuit Court of the United States for the
District of Oregon.*

No. 3156.

April 7, 1910.

ROSA PARR

vs.

THE UNITED STATES OF AMERICA.

Now, at this day, this cause comes on to be heard upon the motion of the plaintiff, filed herein, for an order to make E. L. Swartzlander, Superintendent and Special Disbursing Agent of the Umatilla Indian Reservation, a party defendant in this cause, said plaintiff appearing by Mr. S. A. Lowell, of counsel, and the defendant, the United States of America, appearing by Mr. John McCourt, United States attorney; and it appearing to the Court from the affidavit of said S. A. Lowell, filed herein, that the lands in controversy in this suit are situated on the Umatilla Indian Reservation, and are held by the defendant, the United States of America, as trustee;

that the said E. L. Swartzlander is the duly appointed and acting Superintendent and Special Disbursing Agent of the said Umatilla Indian Reservation, and that as such superintendent and agent he is in control of the lands in controversy in this suit, and has collected the rents therefrom, and retains the same in his possession, and that the money now in his possession received as rents from said land amounts to the sum of six hundred ninety-six dollars and seventy-five cents; and the said United States Attorney consenting hereto, IT IS ORDERED that the said E. L. Swartzlander as Superintendent and Special Disbursing Agent of said Umatilla Indian Reservation be, and he is hereby, made a defendant to this cause.

And, on motion of said United States Attorney, IT IS ORDERED that the answer of the defendant, the United States of America, in this cause may stand as the answer of said E. L. Swartzlander.

R. S. BEAN,
Judge.

Order making Swartzlander, Supt., a defendant.
Filed April 7, 1910. G. H. Marsh, Clerk. By J. W. Marsh, Deputy.

And afterwards, to wit, on the 8th day of April, 1910, there was duly filed in said court, a Replication, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the
District of Oregon.*

ROSA PARR,

Plaintiff,

vs.

UNITED STATES OF AMERICA, Trustee,
Defendant.

**Replication of Complainant to Answer of the De-
fendant.**

This replicant, Rosa Parr, saving and reserving to herself all and all manner of advantages of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of defendant, The United States of America, Trustee, for replication thereunto sayeth that she doeth and will aver, maintain and prove her said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant, without that, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, confessed or avoided, traversed, or denied, is true; all of which matters and things this replicant is ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays as in and by her said bill she hath already prayed.

STEPHEN A. LOWELL,
Solicitors for Complainant.

Replication. Filed April 8, 1910. G. H. Marsh,
Clerk. By V. Johnston, Deputy.

And afterwards, to wit, on the 13th day of June, 1910,
there was duly filed in said court, an Opinion, in
words and figures as follows, to wit:

[Opinion.]

*In the Circuit Court of the United States for the
District of Oregon.*

ROSIE PARR,

Plaintiff,

vs.

UNITED STATES OF AMERICA, Trustee,
Defendant.

LOWELL & WINTER, Attorneys for Plaintiff.

JOHN McCOURT, U. S. Attorney.

BEAN, District Judge:

This case involves the validity of the marriage of
an Indian allottee on the Umatilla Reservation, en-
tered into according to the tribal customs after the
allotment. The marriage is valid and decree will be
entered accordingly. Yakima Joe vs. To-is-lap, just
decreed.

Portland, Oregon, June —, 1910.

Opinion. Filed June 13, 1910. G. H. Marsh,
Clerk.

And afterwards, to wit, on the 13th day of August, 1910, there was duly filed in said court, a Bill of Revivor, in words and figures as follows, to wit:

*In the Circuit Court of the United States for the
District of Oregon.*

MAGGIE ELLEN PARR and JULIA AGNES
PARR, EZRA WALLACE FARROW, by
G. G. LEE, Next Friend of Said EZRA
WALLACE FARROW, a Minor,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Trustee,
ORVILLE D. TOWNSEND, also Known as
ORVILLE D. SAUNDERS,
Defendants.

Bill of Revivor.

To the Honorable, the Judges of the Above-entitled
Court:

Maggie Ellen Parr and Julia Agnes Parr and Ezra Wallace Farrow bring this their bill of revivor against the United States of America, Trustee, Orville D. Townsend, also known as Orville D. Saunders, said Orville D. Townsend being a citizen of the State of Washington and a resident of the city of Toppenish in said State.

And thereupon your orators complain and say:

I.

That on or about the 4th day of June, 1907, Rosa Parr filed her complaint in the above-entitled court against the United States of America, Trustee, which

complaint was duly verified and was as follows, to wit:

*“In the Circuit Court of the United States for the
District of Oregon.*

ROSA PARR,

Plaintiff,

vs.

UNITED STATES OF AMERICA, Trustee,
Defendant.

COMPLAINT.

To the Honorable CHARLES E. WOLVERTON,
Judge of the Circuit Court of the United States
for the District of Oregon:

Rosa Parr of Umatilla County, State of Oregon, a mixed blood Indian woman residing upon the Umatilla Indian Reservation in said County and State, brings this, her bill of complaint against the United States of America, as trustee for the heirs of Isaac Gober, deceased, mixed blood Walla Walla allottee No. 285 on said reservation, and therefore your oratrix complains and alleges:

I.

That under and pursuant to an Act of Congress of the United States of America, entitled “An Act to provide for the allotment of lands in severalty to the Indians residing upon the Umatilla Indian Reservation, granting patents therefor and for other purposes,” approved March 3d, 1885, the following described lands upon the Umatilla Indian Reservation in the State of Oregon, to wit: The South half of the Southwest quarter of Section Twenty-three

(23), in Township Three (3) North, Range Thirty-four (34) East of the Willamette Meridian, containing eighty (80) acres, were allotted to Isaac Gober, mixed blood Walla Walla allottee No. 285, which said allotment was accepted by said Gober, and thereafter a trust patent was issued therefor, as provided in said Act of Congress.

II.

That on or about the 24 day of November, 1899, after said allotment, said Isaac Gober died intestate, unmarried, and without issue, leaving surviving him no lineal descendants, nor father, nor mother, nor brother, nor sister, except your complainant, Rosa Parr, the sole and only sister of said Isaac Gober.

III.

That by virtue of said Act of Congress and the laws of the State of Oregon, this complainant was and is the sole and only heir at law of said Isaac Gober, deceased, and that the title to said land so allotted to him immediately vested in her, upon his death, and this plaintiff ever since his death has been and now is the owner of and entitled to the immediate possession of all of said lands and the rents, issues and profits thereof, and that said defendant unlawfully denies the right of plaintiff to said allotment, and is unlawfully excluding her from the same.

To the end therefore that your oratrix have that relief that can only be obtained in a court of equity, and that the said defendant may answer the premises, but not under oath or affirmation, benefit whereof is expressly waived, she now prays the Court for a decree declaring her to be the sole and only heir at

law of said Isaac Gober, deceased, and as such the owner of and entitled to the immediate possession of said lands so allotted to him, as hereinbefore described, and to all of the rents, issues and profits thereof since his death, and that she be placed in possession of said lands, and recover her costs and disbursements of this suit, and for such other and further relief in the premises as to equity may seem meet and proper. And may it please your Honor to grant to your oratrix a writ of subpoena to be directed to the defendant herein, commanding it at a certain time to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, to stand, perform and abide by such orders, directions and decrees as may be made against it in the premises as shall seem meet and agreeable to equity, and your oratrix will ever pray.

CHAMBERLAIN, THOMAS & HAILEY,
Solicitors for Complainant."

And that thereafter said cause was placed at issue by the filing of an answer and replication, and thereafter the cause was referred to Vida Johnston of Pendleton, Umatilla County, Oregon, for the taking of testimony, and thereafter the testimony was taken and filed with the above-entitled court under the certificate of said referee, and that thereafter said cause was argued by the filing of written briefs and has been submitted to the Court for determination, and that no decree has been entered.

II.

That during the pendency of the proceedings, un-

der said bill of complaint, on or about the 15th day of May, 1910, the said Rosa Parr died, leaving as her sole and only heirs at law your petitioners, Maggie Ellen Parr, Julia Agnes Parr, who are daughters of said Rosa Parr, deceased, and Wallace Ezra Farrow who is a son of said Rosa Parr, deceased, and defendant Orville D. Townsend, also known as Orville D. Saunders, the husband of said Rosa Parr, deceased; that your orators are informed that the true name of said defendant is Orville D. Townsend, but that he usually goes by the name of Orville D. Saunders.

III.

That the lands involved in said suit are Umatilla Indian Reservation lands unpatented; that the title thereto is still in the Government of the United States, and that the courts of the State of Oregon have no jurisdiction to administer upon the interest of said deceased therein, and that it is necessary that this court shall enter its decree declaring who are the heirs of said Rosa Parr, deceased, for the reason that when patent issues to said lands it will be issued to the heirs of the allottee, and it will be necessary, therefore, in this decree for this Court to determine who the heirs of said allottee are.

IV.

That your orators further show that these plaintiffs and said Wallace Ezra Farrow are the only children or lineal descendants of Rosa Parr, deceased, and that after commencing said suit she remarried, and that the defendant Orville D. Saunders, whose true name is Orville D. Townsend, was at the

time of her death her husband, and that these plaintiffs and said Wallace Ezra Farrow are the sole and only heirs of her, the said Rosa Parr, deceased, in said lands, subject to the curtesy right, if any exists, upon Umatilla Indian Reservation lands unpatented, in the defendant Townsend, her said husband.

V.

Your orators further show that said suit having become abated by reason of the death of said Rosa Parr, as aforesaid, your orators are advised that they are entitled to have the same revived and restored to the same plight and condition in which it was at the time of the death of said Rosa Parr, and to have the same relief against the United States of America, trustee, defendant.

Wherefore, your orators pray that said cause may be revived by the decree of this Honorable Court, and that it may proceed to a decree in favor of the heirs of said deceased in accordance with the prayer of the original complaint herein.

And your orators further pray that it may please your Honors to grant a writ of subpoena to be directed to the said United States of America, trustee, and Orville D. Saunders, whose true name is Orville D. Townsend, thereby commanding them at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and to show cause, if any they have, why this cause should not be revived, and if no cause shall be shown by said defendants why said suit should not be revived, then that a decree be entered reviv-

ing said suit in favor of the heirs of said deceased.

LOWELL & WINTER,
Solicitors for Complainants.

State of Oregon,
Umatilla County,—ss.

I, Maggie Ellen Parr, being first duly sworn, say that I am one of the plaintiffs herein, and that I know the contents of the foregoing bill of revivor, and that the same are true as I verily believe.

MAGGIE ELLEN PARR.

Subscribed and sworn to before me this 17th day of June, 1910.

[Seal]

STEPHEN A. LOWELL,
Notary Public for Oregon.

Bill of Revivor. Filed Aug. 13, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 17th day of August, 1910, there was duly filed in said court, an Answer to Bill of Revivor, in words and figures as follows, to wit:

*In the Circuit Court of the State of Oregon for the
District of Oregon.*

MAGGIE ELLEN PARR, and JULIA AGNES
PARR, EZRA WALLACE FARROW, by G.
G. LEE, Next Friend of Said EZRA WAL-
LACE FARROW, a Minor,
Plaintiffs,
vs.

THE UNITED STATES OF AMERICA, Trustee,
and ORVILLE D. TOWNSEND, also Known
as ORVILLE D. SAUNDERS, and LOUISE
COLFAX, and E. L. SWARTZLANDER,
Defendants.

Answer [to Bill of Revivor].

Come now Louise Colfax, and the United States of America, trustee, two of the defendants in the above-entitled cause and make this their answer to the bill of revivor, filed herein, and now and at all times hereafter saving to themselves any and all manner of benefits of exceptions, or otherwise, that can or may be taken to the many errors, uncertainties and imperfections in said bill of complaint contained, and for answer thereto, or so much thereof as said defendants are advised is material, or necessary for them to make answer to, answering, say:

1.

These defendants admit all the allegations contained in paragraph 1 of said bill.

2.

Answering paragraph 2 these defendants admit

that, during the pendency of the proceedings, under the said bill of complaint, on or about the 15th day of May, 1910, the said Rosa Parr died, leaving as her sole and only heirs at law the petitioners, Maggie Ellen Parr, Julia Agnes Parr, who are daughters of the said Rosa Parr, deceased, and Wallace Ezra Farrow, who is a son of the said Rosa Parr, deceased, and defendant Orville D. Townsend, also known as Orville D. Saunders, the husband of the said Rosa Parr, deceased.

3.

That these defendants admit the allegations contained in paragraph 3 of the said bill.

4.

In answering paragraph 4 of the said bill of revivor, these defendants admit that the said Wallace Ezra Farrow, Maggie Ellen Parr and Julia Agnes Parr, are the only children, or lineal descendants of Rosa Parr, deceased, and that after commencing said suit she remarried and that the defendant, Orville D. Saunders, whose name is Orville D. Townsend, was at the time of her death her husband, but these defendants deny that the said plaintiffs are the sole or only heirs or any heirs of her, the said Rosa Parr, deceased, in said lands subject to the curtesy right, or any curtesy or right upon the Umatilla Indian Reservation land unpatented in the defendant, Townsend, her said husband, and these defendants further answering the said allegations allege that the said Rosa Parr, at the time of her said death, and at no time prior thereto, was not the only or any heir to the said Isaac Gober, for the reason that,

at the time of the death of the said Isaac Gober, he left surviving him his wife, this defendant, Louise Colfax, with whom the said Isaac Gober intermarried upon the Umatilla Indian Reservation, after the allotment was made to him, and with whom he was living at the time of his death under the laws and customs of the Indians residing upon the Umatilla Indian Reservation and who thereafter, within two weeks of the death of the said Isaac Gober, the said defendant, Louise Colfax-----being at the time of the death of the said Isaac Gober his wife, the said defendant and the said Isaac Gober having intermarried and lived and cohabited together as husband and wife under the laws and customs of the Indians constituting the consolidated tribes or bands of Indians located and living upon the Umatilla Indian Reservation in Umatilla County, State of Oregon, the said defendant, Louise Colfax, being a full blood Indian woman, and the said Isaac Gober being a mixed blood Indian man, and being members of the Walla Walla band of Indians, and, at the time of his said death, the said Isaac Gober left surviving him no lineal descendants, and by reason of the facts herein stated the said infant son of the defendant, Louise Colfax and the said Isaac Gober, became the sole heir, under the laws of the State of Oregon, of the said Isaac Gober and as such the equitable owner in fee of the lands allotted to the said Isaac Gober upon the Umatilla Indian Reservation and which is described in said Bill of Revivor, subject only to the dower rights of the defendant, Louise Colfax in and to said land, the said dower right being, under

the laws of the State of Oregon, the right to the use of one-half of said land, or rents, issues and profits thereof, during the life of the said defendant, Louise Colfax, and thereafter the said infant son of the said Isaac Gober died intestate, leaving no lineal descendants, but left the defendant, Louise Colfax, his mother, surviving him as his only heir.

5.

In answering paragraph 5 of the said bill of revivor, these defendants admit that the plaintiffs are entitled to have the said suit revived and restored to the said plight and condition in which it was at the time of the death of the said Rosa Parr, but these defendants deny that the said plaintiffs have any right to the same or any relief against the United States of America, trustee, defendant, but these defendants allege that they are entitled to a decree declaring the defendant, Louise Colfax, to be the sole heir, under the laws of the State of Oregon, of the deceased, Isaac Gober, and as such is the owner of the said equitable title in fee of said lands so allotted to the said Isaac Gober, and the rents, issues and profits thereof.

Wherefore, these answering defendants pray a decree of this Honorable Court dismissing the bill of complaint and the bill of revivor.

JOHN McCOURT,

U. S. District Attorney.

C. H. CARTER, and

R. J. SLATER,

Solicitors for Deft. Louise Colfax.

Answer to Bill of Revivor. Filed August 17, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 17th day of August, 1910, there was duly filed in said court, a Replication, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

MAGGIE ELLEN PARR and JULIA AGNES PARR, EZRA WALLACE FARROW, by G. G. LEE, Next Friend of Said EZRA WALLACE FARROW, a Minor,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, Trustee, and ORVILLE D. TOWNSEND, Also Known as ORVILLE D. SAUNDERS, and LOUISE COLFAX, and E. L. SWARTZLANDER,

Defendants.

Replication [to Answer of Louise Colfax and U. S. A.].

For replication to the answer of the defendants Louise Colfax and the United States of America, trustee, in this cause, come the plaintiffs, by their solicitors, and, reserving to themselves the benefit of all proper admissions and disclosures contained in said answer, join the issue upon said answer and every allegation thereof, and these replicants are ready to prove all the matters contained in their bill

as this Honorable Court may direct.

LOWELL & WINTER,

Solicitors for Plaintiffs.

Replication. Filed August 17, 1910. G. H. Marsh,
Clerk.

And afterwards, to wit, on Wednesday, the 17th day of August, 1910, the same being the 109th judicial day of the regular April, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Allowing Entry of Decree Nunc Pro Tunc.]

In the Circuit Court of the United States for the District of Oregon.

No. 3156.

LOUISE COLFAX,

Cross-complainant,

vs.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW, G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor, ORVILLE D. TOWN-
SEND, E. L. SWARTZLANDER and THE
UNITED STATES OF AMERICA, Trustee,
Cross-defendants.

This matter coming on at this time to be heard upon the motion of the cross-complainant by her solicitors Fee and Slater, in open court made for the

entry of a decree *nunc pro tunc* as of the 14th day of June, 1910, in accordance with the decision of the Court rendered herein upon said date, and for leave to file a cross-bill, answer and replication in said cause *nunc pro tunc* as of said date, the said cross-complainant appearing by Fee and Slater of counsel and the defendant Yakima Joe by Lowell and Winter of counsel, and the defendants Orville D. Townsend, E. L. Swartzlander and the United States of America, trustee appearing by Honorable John McCourt, United States Attorney for the District of Oregon, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the said decree may be entered *nunc pro tunc* as of the said date, and the said proceedings filed *nunc pro tunc* as of said date.

Done and dated in open court at Portland, Oregon, this 17th day of August, 1910.

R. S. BEAN,
Judge.

Order. Filed August 17, 1910. G. H. Marsh,
Clerk.

And afterwards, to wit, on the 17th day of August, 1910, as of and for June 14, 1910, there was duly filed in said court, a Cross-bill of Louisa Colfax, in words and figures as follows, to wit:

[Cross-bill of Louise Colfax.]

In the Circuit Court of the United States for the District of Oregon.

LOUISE COLFAX,

Cross-complainant,

vs.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW, by G. G.
LEE, Next Friend of the Said EZRA WALLACE FARROW, a Minor, ORVILLE D. TOWNSEND, E. L. SWARTZLANDER and THE UNITED STATES OF AMERICA,
Trustee,

Cross-defendants.

To the Hon. Judges of the Circuit Court of the United States for the District of Oregon:

Louise Colfax, an Indian woman and a citizen of the United States and a resident of the Yakima Indian Reservation in the State of Washington, and the same party who was made a defendant in the bill of complaint in the suit entitled "Rosa Parr, plaintiff, vs. The United States of America, Trustee, and Louise Colfax, defendants," exhibits this her cross-bill and states as follows:

I.

That upon the —— day of ———, 191—, the said Rosa Parr commenced a suit in this court and exhibited and filed therein her bill of complaint against this cross-complainant and The United States of America, trustee, for the purpose of obtaining a

decree of this Honorable Court declaring the said plaintiff to be the sole heir under the laws of the State of Oregon of one Isaac Gober, deceased, and in the said bill of complaint the said Rosa Parr alleged substantially as follows:

“That under and pursuant to an Act of Congress of The United States of America entitled, ‘An act to provide for the allotment of lands in severalty to the Indians residing upon the Umatilla Indian Reservation granting patents therefor, and for other purposes,’ approved March 3, 1885, the following described lands upon the Umatilla Indian Reservation in the State of Oregon, to wit: The S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 23, in Twp. 3 S., R. 35 E. W. M. containing 80 acres were allotted to Isaac Gober, a mixed blood, Walla Walla allottee No. 285, which said allotment was accepted by said Gober and thereafter a trust patent was issued therefor as provided in said Act of Congress.

That on or about the 24th day of November, 1899, after said allotment, said Isaac Gober died intestate, unmarried and without issue, leaving no lineal descendants, nor father, nor mother, nor brother, nor sister, except your complainant, Rosa Parr, the sole and only sister of the said Isaac Gober.

That by virtue of the said Act of Congress and the laws of the State of Oregon, this complainant was and is the sole and only heir at law of said Isaac Gober, deceased, and that the title to the said land, so allotted to him, immediately vested in her, upon his death, and this plaintiff ever since his death has been and now is the owner of and entitled to the

immediate possession of all of the said lands and the rents, issues and profits thereof, and that said defendant unlawfully denies the right of plaintiff to said allotment and is unlawfully excluding her from the same.”

And thereupon the said Rosa Parr prayed that the said defendants be required to answer the premises but not under oath or affirmation, benefit whereof is expressly waived, and for a decree of this Court declaring her to be the sole and only heir of the said Isaac Gober, deceased, and as such the owner of and entitled to the immediate possession of said land so allotted to him, and all the rents, issues and profits thereof since his death, and that she be placed in possession of said lands and that she recover her costs and disbursements of said suit and for such other and further relief in the premises as to equity may seem meet and proper, and that the Court grant a writ of subpoena to be directed to the defendant therein etc.

2.

That thereafter the defendant, The United States of America, Trustee, filed its answer therein denying the equities in said bill contained and this cross-complainant filed her separate answer therein denying the equities in said bill contained and alleging that your cross-complainant was at all the times mentioned in the said bill of complaint, and at all times, mentioned in her said answer, a full blood Indian woman between 30 and 40 years old, and that she belonged to the Yakima band of Indians, residing and located upon the Yakima Indian Reservation in

the State of Washington, that about three or four years prior to the 24th day of November, 1899, your cross-complainant intermarried with the said Isaac Gober on the Umatilla Indian Reservation in the State of Oregon, according to the customs of the consolidated tribes of the Walla Walla, Umatilla and Cayuse bands of Indians living and residing upon the said Umatilla Indian Reservation and thereafter the said Isaac Gober and your cross-complainant lived and cohabited together as husband and wife upon the said Umatilla Indian Reservation in Umatilla County, Oregon, until on or about the said 24th day of November, 1899, when the said Isaac Gober died intestate, leaving surviving him no lineal descendants, but did leave surviving him your complainant as his wife who was at the time of the death of the said Isaac Gober with child by him, and thereafter about two weeks after the death of Isaac Gober there was born to me a male child, who was the son of the said Isaac Gober, that by reason of the said death of the said Isaac Gober and the birth of the said child the said child became the sole heir of the said Isaac Gober under the laws of the State of Oregon and as such was the equitable owner of the equitable title in and to the lands described in the said bill of complaint which were allotted to the said Isaac Gober, under the said Act of Congress, the said equitable title being subject to a dower estate, under the laws of the State of Oregon in your cross-complaint, who was the wife of the said Isaac Gober, which dower estate consisted of the right to the use and occupation of one-half of said land, or the rents,

issues and profits thereof, during the lifetime of your cross-complainant, and which answer prayed for a decree dismissing the said bill, &c.

3.

And your cross-complainant further shows to your Honors:

That on the 9th day of June, 1855, a treaty between the United States on the one hand, and the Walla Walla, Cayuse and Umatilla Indian bands and Indian tribes on the other, was concluded at Camp Stephens, in Walla Walla Valley, in Washington territory, and duly signed by the representatives of said parties, and that said treaty was ratified by the United States Senate on the 8th day of March, 1859, wherein and whereby the said tribes of Indians through their duly accredited representatives, ceded to the United States all their right, title and claim to a large tract of country, situate in the territory of Oregon and Washington; and, after a description of said lands so ceded, provided as follows: "That so much of the country described above as is contained in the following boundaries, which tract for the purpose contemplated shall be held and regarded as Indian reservation, to wit: commencing in the middle of the channel of the Umatilla River, opposite the mouth of Wild Horse creek; thence up the middle of the channel of said creek to its source; thence southerly to a point in the Blue Mountains known as Lee's Encampment; thence in a line to the head waters of Howtome creek; thence west to the divide between Howtome and Birch creek; thence northerly along said divide to a point due west of the south-

west corner of William C. McKay's land claim; thence east along his line to his southwest corner; thence to the place of beginning, all of which tract shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use; not shall any white person be permitted to reside upon the same without permission of the agent and superintendent. The said tribes and bands agree to move to and settle upon the same within one year after the ratification of this treaty, without any additional expense to the Government, other than is provided by this treaty, and until the expiration of the time specified that said bands shall be permitted to occupy and reside upon the tracts now possessed by them; guaranteeing to all citizens of the United States the right to enter upon and occupy as settlers any land not actually enclosed by said Indians.

4.

That said land described above is known and designated as the Umatilla Indian Reservation in Umatilla County, State of Oregon.

5.

That said treaty provided in article 6, as follows: "The President may from time to time, at his discretion cause the whole of such portion as he may think proper of the tract that may now or hereafter be set apart as a permanent home for the Indians to be surveyed in lots and assigned to such Indians of the confederated bands, as may wish to enjoy the privileges, and locate thereon permanently; to a single person over twenty-one years of age, forty acres; to a family of two persons, sixty acres; to a family of

three and not exceeding five, eighty acres; to a family of six and not exceeding ten, one hundred and twenty acres; and to each family over ten in number, twenty acres to each additional three *numbers*, and the President may provide for such rules and regulations as will secure to a family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and improvement thereon, and he may at any time, at his discretion, after such person or family, has made location on the land assigned, as a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years, and shall continue in force until a State constitution embracing such lands within its limits shall have been formed, and the legislature of the state shall remove the restriction.”

6.

That on the 3d day of March, 1885, the Congress of the United States passed an act entitled “An Act providing for the allotment of lands in severalty to the Indians residing upon the Umatilla Reservation in the State of Oregon and granting patents therefor, and for other purposes.” Which said act was approved by the President of the United States March 3d, 1885; which said act provided that the President of the United States should cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing upon the Umatilla Reservation in the State of Oregon as follows:

Of agricultural lands to each of the family, 160 acres; to each single person over the age of 18 years,

80 acres; to each orphan child under 18 years of age, 80 acres; and to each child under 18 years of age not otherwise provided for, 40 acres; and that all allotments to heads of families and to children under the age of 18 years belonging to families, shall be made upon selection made by the head of the family and the allotments to persons over the age of 18 years not classed as heads of families, should be made upon the selection of such persons." Said act further provided for the appointment of three disinterested persons by the President to go upon said reservation and make said allotments in severalty, and to do all such acts as were further specified in said act to effectually carry out the purpose thereof.

7.

That in pursuance of said authority the President of the United States did appoint commissioners, who thereafter carried out the purposes of said act and made allotments of lands as therein provided to the members of said confederated tribes of Indians, for the bands upon the said Umatilla Reservation, which said work was completed and said allotments made and approved about the 12th day of April, 1893.

8.

That prior to making the allotment, a commission of three persons *were* appointed by authority of the United States to obtain the written consent of a majority of the head men of said three tribes of Indians to the making of the allotments of lands amongst them, and said commission did, prior to the making of the allotment, obtain the written consent of the chiefs, and of a majority of the head men of all three

of said tribes to said allotment, which consent was given by them, severally and individually, in writing and over their signatures.

9.

That at the time of the allotment by the United States of the lands of the Umatilla Reservation to the Indians belonging on said reservation, there were about 1045 of such Indians, to wit: about 393 Indians of the Cayuse tribe, 196 Indians of the Umatilla tribe and 456 Indians of the Walla Walla tribe, and there were then allotted to them in all about 100,000 acres of land on said reservation, the heads of families of said Indians being allotted 160 acres each, the adults not heads of families being allotted 80 acres each and the infants 40 acres each; and about 50,000 acres of said Umatilla Reservation was set apart and held, and is still held, for the use of all of said Indians in common for pasturing, timber and other purposes; and about 25,000 acres of said reservation, as it existed at the time of the allotment, was cut off and sold in parcels to the highest bidder for them.

10.

And this cross-complainant further alleges that at all the times mentioned herein, the United States of America, has kept and maintained, and still does keep and maintain, an agent and superintendent (E. L. Swartzlander being such superintendent at this time) upon and over said Umatilla Indian Reservation and the Indians belonging thereto and thereon, who at all said times has had supervision and control of said reservation and Indians who are allottees thereon, under and in accordance with the laws of

the United States and of the Rules and Regulations made by the Secretary of the Interior pursuant to said laws.

11.

That at all the times mentioned herein and from time immemorial it has been, and still is, the custom, usage and habit of the Indians belonging upon the Umatilla Indian Reservation, to wit: the Umatilla, Cayuse, and Walla Walla tribes of Indians, for the males and females of said tribes to intermarry by merely agreeing to live together and cohabiting as husband and wife, without other or further ceremony, act or proceeding and for husband and wife to terminate the marriage contract and relation and become divorced from each other by agreeing to separate and ceasing cohabitation, or by either husband or wife deserting his or her consort and ceasing to live with said consort as husband or wife, without any other ceremony, act or proceeding.

12.

And your cross-complainant now shows to your Honors that under and pursuant to said act of Congress of the United States of America, approved March 3, 1885, the lands described in the said bill of complaint, to wit, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 23 Twp. 3 N. R. 34 E. W. M., containing 80 acres were allotted to Isaac Gober, a mixed blood Indian, a member of the Walla Walla band of Indians, who at said time lived and resided upon the said Umatilla Indian Reservation, the said allotment being known and designated as Walla Walla No. 285.

13.

That thereafter, to wit, on or about the 12th day of September, 1893, the said allotment was approved by the Secretary of the Interior and thereafter a trust patent was issued to the said Isaac Gober under the terms and conditions of the said Act of Congress, that after the said allotment had been made and approved, as aforesaid, to wit: On or about the — day of ———, 1895, the said Isaac Gober, while residing upon the Umatilla Indian Reservation as a member of the Walla Walla band of Indians, and your cross-complainant being a full blood Indian woman and a member of the Yakima band of Indians intermarried upon the Umatilla Indian Reservation in Umatilla County, State of Oregon, by then and there agreeing with each other under the laws and customs of the said tribes of Indians located and residing upon the said Umatilla Indian Reservation to live and cohabit together as husband and wife, and thereafter the said Isaac Gober and your cross-complainant did live and cohabit together as husband and wife, upon the said Umatilla Indian Reservation, continuously, until the 24th day of November, 1899, at which time the said Isaac Gober died intestate and left surviving him no children, or other lineal descendants, but did leave surviving him your cross-complainant, his wife, who at the time of the said death of the said Isaac Gober, was with child by him and about two weeks after the death of the said Isaac Gober there was born to your cross-complainant a male child, a son of the said Isaac Gober, deceased.

14.

That by reason of the death of the said Isaac Gober and the birth of the said male child, the son of the said Isaac Gober, and your complainant, the said male child became and was the sole heir of the said Isaac Gober under the laws of the State of Oregon, and by reason thereof became the owner in fee of the equitable title to said land, subject only to the dower estate therein of your cross-complainant, which dower estate, under the laws of the State of Oregon at the time of the death of the said Isaac Gober, consisted of a life estate of one-half in said lands or the rents, issues and profits thereof.

15.

That by reason of the death of the said son of the said Isaac Gober and your cross-complainant, after the death of the said Isaac Gober, your cross-complainant, the mother of the said son deceased, became and is under the laws of the State of Oregon, the sole heir of the said son and the said Isaac Gober, and as such, is the sole owner of the equitable title in fee to the said land and is entitled to the actual possession thereof.

16.

That after the death of the said Isaac Gober, and prior to the commencement of this suit, the defendant, the United States of America, to the exclusion of the said son of the said Isaac Gober and your cross-complainant, recognized the said Rosa Parr, deceased, as the sole heir of the said Isaac Gober, deceased, and as such permitted the said Rosa Parr to have the possession and use of the said land and

the rents, issues and profits thereof.

17.

That ever since the commencement of this suit and the filing of the said writ of complaint, the defendant, the United States of America, Trustee, has refused to recognize either the said Rosa Parr, now deceased, or her heirs, defendants, herein, or your cross-complainant as the heir or heirs of the said Isaac Gober, and has retained the rents, issues and profits of said land in the possession and control of its said agents.

18.

Since the filing of the said bill of complaint the said Rosa Parr died intestate, leaving surviving her as her only heirs under the laws of the State of Oregon, the defendants, Maggie Ellen Parr, Julia Agnes Parr and Ezra Wallace Farrow, a minor, and Orville D. Townsend, her husband, and since the said death of the said Rosa Parr the said defendants have filed their bill of revivor, praying for a decree of this Court in favor of the said heir of deceased in accordance with the prayer of the original complaint.

19.

That your cross-complainant admits that Maggie Ellen Parr and Julia Agnes Parr and Ezra Wallace Farrow are the heirs under the laws of the State of Oregon of the said Rosa Parr and that the defendant, Orville D. Townsend, was the husband of the said Rosa Parr at the time of her death, but the said defendants were not the heirs under the laws of the State of Oregon, or otherwise of the said

Isaac Gober, deceased, and that the said heirs and the said Orville D. Townsend, by reason of the facts hereinbefore alleged have no right, title or interest in or to the said lands, which were allotted to the said Isaac Gober.

20.

That the rents, issues and profits derived from said lands as there cross-complainants are informed have been in the form of money rents paid by certain tenants whose names are not known at this time to this cross-complainant, but the same has been paid as they are informed and believed, to the various Indian Agents and Special Disbursing Agents of the United States of the Umatilla Indian Reservation, and those rents and profits are now in the hands of the present superintendent and special disbursing agent of the United States of said Umatilla Indian Reservation, to wit: Mr. E. L. Swartzlander, but the amount thereof, or what the present rental of said lands may be, these cross-complainants do not know.

21.

That the defendant, E. L. Swartzlander, is now and ever since the 1st day of July, 1909, has been the Superintendent and Special Disbursing Agent of the defendant, The United States of America, Trustee, for the Umatilla Indian Reservation, and as such agent, he has collected and retained in his possession all the rents, issues and profits accruing from said land.

22.

That the value of the land, allotted to the said

Isaac Gober, as aforesaid, is of the value of about \$7,000.

23.

That your cross-complainant has no plain, speedy or adequate remedy at law.

Wherefore, this cross-complainant prays that the cross-defendants, each and every of them, be required to answer the foregoing cross-bill, but not upon oath or affirmation, the benefit of which is expressly waived, that the cross-complainant be decreed to be the sole heir, under the laws of the State of Oregon, of Isaac Gober, deceased, and his son, who died in infancy, after his said death, and as such heir that cross-complainant is and ever since the death of the said infant son has been the owner of the equitable title to the lands described in the bill of complaint, and in this cross-bill and as such owner was and is entitled to the exclusive possession and use of the said land and to the rents, issues and profits thereof, and that the defendant, The United States of America, trustee, holds the title thereto in trust for this cross-complainant under the trust and conditions of the Act of Congress, approved March 3, 1885, and that the cross-complainant is entitled to an accounting from the said defendant, The United States of America, Trustee, for all the rents, issues and profits received by it from said land since the death of the said Isaac Gober, and that the defendants, herein, Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow and Orville D. Townsend, otherwise known as Orville D. Saunders, have no interest in said land, or in the rents, issues and profits

thereof, and that this cross-complainant may have such other and further relief as may be just and equitable.

May it please your Honors to grant unto your oratrix, this cross-complainant, the most gracious writ of subpoena to be issued out of and under the seal of this Honorable Court, directed to the said cross-defendants commanding each and every of them to appear before your Honors in this Honorable Court on a certain day and under a certain penalty therein to be provided to answer the premises, and further to abide by and perform such decree herein as your Honors shall seem meet, and thus your oratrix as in duty bound will ever pray.

C. H. CARTER and

R. J. SLATER,

Solicitor for Cross-complainant.

Cross-bill No. ——. Filed August 17, 1910, *nunc pro tunc* as of June 14, 1910, by order entered August 17, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 17th day of August, 1910, as of and for June 14, 1910, there was duly filed in said court, an Answer to Cross-bill, in words and figures as follows, to wit:

[Answer to Cross-bill.]

*In the Circuit Court of the United States for the
District of Oregon.*

LOUISE COLFAX,

Cross-complainant,

vs.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW, by G. G.
Lee, Next Friend of the Said Ezra Wallace
Farrow, a Minor, ORVILLE D. TOWN-
SEND, E. L. SWARTZLANDER and THE
UNITED STATES OF AMERICA, Trus-
tee,

Cross-defendants.

ANSWER OF DEFENDANTS UNITED
STATES, E. L. SWARTZLANDER, MAG-
GIE ELLEN PARR, JULIA AGNES
PARR, AND EZRA WALLACE FARROW,
A MINOR, BY G. G. LEE, HIS NEXT
FRIEND, TO PLAINTIFF'S CROSS-COM-
PLAINT.

The defendants Maggie Ellen Parr, Julia Agnes Parr, and Ezra Wallace Farrow, a minor, by G. G. Lee, his next friend, E. L. Swartzlander and the United States, for answer to the Cross-bill exhibited herein say:

I.

These defendants admit that Louise Colfax, cross-complainant herein, is a resident of the Yakima Indian Reservation in the State of Washington, and is

a citizen of the United States of America, and is the same party who was made a defendant in the bill of complaint in that certain suit entitled Rosa Parr, plaintiff, vs. The United States of America, Trustee, and Louise Colfax, defendants.

II.

These defendants admit all the allegations of paragraph I of said Cross-bill, and these defendants admit that the United States of America and said Louise Colfax filed separate answers in said suit entitled Rosa Parr, plaintiff, vs. The United States of America, Trustee, and Louise Colfax, defendants, which separate answer substantially alleged as is averred in paragraph II of said Cross-bill.

III.

These answering defendants admit the allegations contained in paragraphs III, IV, V, VI, VII, VIII, IX and X of said Cross-bill.

IV.

Further answering said Cross-bill, and for answer to paragraph XI thereof, these answering defendants deny that during any of the times mentioned in said Cross-bill, it was the custom, usage or habit of the Indians belonging upon the said Umatilla Indian Reservation, to wit, the Umatilla, Cayuse and Walla Walla tribe of Indians, or any of the said tribe of Indians, for the males and females of said tribes or tribe, to intermarry by merely agreeing to live together and cohabiting as husband and wife and without any other ceremony, and in this connection these answering defendants allege the truth concerning said matter to be that prior to the allotment of

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the lands in severalty to the Indians upon said reservation, said Indians were not married according to the laws of the State of Oregon; that prior to said allotment some of the Indians upon said reservation lived together and cohabited as husband and wife by mere agreement, and without any other ceremony whatever, while the members of some of said tribes, pursuant to a custom prevailing among said Indians, were married according to a certain ceremony which consisted of giving presents and feasts by the contracting parties or their parents; that it is true that prior to the allotment of lands in severalty upon said reservation, according to custom, some of the Indians of said reservation, lived and cohabited with a plurality of wives without entering into the marriage relation with any of said wives otherwise than by mutual consent or agreement. But that since said allotment of lands a large majority of the Indians upon said reservation, to wit, about seventy per cent of them, have become married and are married pursuant to the laws of the State of Oregon; that it is true that since the allotment and now some of the Indians upon said reservation still live together and cohabit as husband and wife without being married at all except that they so live together and cohabit by mutual consent, but that the Indians upon said reservation who are now living together and cohabiting as husband and wife without having entered into the marriage relation, as required by the laws of the State of Oregon, do not exceed thirty per cent of the total number of the Indians upon said reservation, and that the re-

mainder of said Indians upon said reservation have been married as required by the laws of the State of Oregon.

That it is not true that the Indians upon said reservation terminate their marriage contract and agreement, or become divorced from each other, by an understanding to separate and cease living together as husband and wife; that it is not true that the Indians living upon said reservation become divorced and annul their marriage relation by the husband or wife deserting his or her consort, or by ceasing to live with each other as husband and wife, without any further act or proceeding; that in this connection these defendants allege that prior to the allotment of lands in severalty to said Indians, that Indians living upon said reservation did, after having consented and agreed to live together as husband and wife, and after living with each other as husband and wife, terminate their said so-called marriage relations at the will of both, or at the will of either of said husband and wife, but that since the allotment of land in severalty to said Indians upon said reservation a large majority of the Indians upon said reservation do not terminate, and do not attempt to terminate, their marriage relations otherwise than as provided by the laws of the State of Oregon.

That the custom, usage, and habits which prevailed among said three tribes of Indians upon said reservation prior to the allotment of land in severalty, pertaining to the marriage status and the custom of living together as husband and wife without entering

into the marriage relation as required by the laws of the State of Oregon, does not now prevail upon said reservation among a majority and among at least seventy per cent of the Indians thereon, and that the custom of terminating and annulling the marriage relation by consent, or at the will of either husband or wife, which prevailed among said Indians prior to the allotment of the lands in severalty, does, since the allotment of lands in severalty upon said reservation, not obtain among a large majority of the Indians thereon, and that the former custom which prevailed among said Indians, or many of them, prior to the allotment of lands in severalty, of living with a plurality of wives, has, since the allotment of lands in severalty, been abandoned by said Indians upon said reservation.

V.

These defendants admit the allegations of paragraph XII and admit that on or about the 12th day of September, 1903, the allotment made to Isaac Gober was approved by the Secretary of the Interior, as alleged in said Cross-bill, and that after said allotment had been made to said Isaac Gober, as alleged in paragraph XIII of said Cross-bill, and on or about the — day of ———, 1895, said Gober, while residing upon the Umatilla Indian Reservation, and said Louise Colfax, pursuant to an understanding had with each other, began to cohabit together and at times lived together as husband and wife, and that they so cohabited and lived together at times until on or about the 24th day of November, 1899, at which time said Isaac Gober died intestate and

left surviving him no children or lineal descendants, except that at the time of the death of the said Gober this cross-complainant was with child by him, and about two weeks after the death of said Gober there was born to said Louise Colfax a son, of which said Isaac Gober was the father; but these defendants deny that said Louise Colfax and said Isaac Gober were married according to the customs then prevailing among the Indians upon said reservation, and deny that there was any custom which at said time prevailed among the Indians upon said reservation pursuant to entering into the marriage relations without being married pursuant to the laws of the State of Oregon, and these defendants deny that said Isaac Gober and said Louise Colfax were ever married, and allege the fact to be that said Isaac Gober and said Louise Colfax, by mutual consent, lived and cohabited together at different intervals between the — day of —, 1895, and until said Isaac Gober died, but that they were not married pursuant to any of the laws of the State of Oregon by any minister of the Gospel, or any minister or priest of any church, or by any officer authorized under the laws of the State of Oregon to perform marriage ceremonies, and were not married at all, unless living and cohabiting together by consent as husband and wife as a matter of law could constitute a marriage.

VI.

And therefore these defendants, further answering paragraph XIV of said Cross-bill, deny that the son of said Louisa Colfax, of which son said Isaac

Gober was the father, became the sole heir of said Isaac Gober, and deny that said child, upon the death of said Isaac Gober, became the owner in fee or otherwise of the land allotted to said Isaac Gober, and deny that said cross-complainant, upon the death of said Isaac Gober, became entitled to a dower interest to the lands allotted to said Isaac Gober.

VII.

Answering paragraph XV of said Cross-bill, these defendants admit that on or about the — day of ———, 189—, said male child, the said son of said Louise Colfax, died in infancy, intestate, without any lineal descendants, leaving surviving him his mother, said Louise Colfax, and that his mother, under the laws of the State of Oregon, would be the sole heir of said child, but denies that by reason of the death of said child, either under any law of Congress or any law of the State of Oregon, said Louise Colfax became the owner of the equitable title in fee, or any owner at all, of said land allotted to said Isaac Gober.

VIII.

Answering paragraph XVI, these defendants admit that after the death of said child said Louise Colfax requested the defendant, the United States of America, through its agent, to recognize her as the sole heir of said Isaac Gober and of said child, and as such to allow her to have the usufruct of the lands allotted to said Isaac Gober, but that the defendant, the United States, refused to recognize her, said Louise Colfax, as entitled to the possession, rents and profits of said land allotted to said Isaac Gober, and that the United States, as alleged in paragraph XVI

of said Bill, did recognize said Rosa Parr, now deceased, as the sole heir of said Isaac Gober, and as such permitted said Rosa Parr to have the possession and rents and profits of said land allotted to said Isaac Gober.

IX.

These defendants admit the allegations contained in paragraphs XVII, XVIII, XIX, XX, XXI, XXII of said Cross-bill.

These defendants deny each and every allegation in said Cross-bill not heretofore specifically answered unto, and pray that it may be hence dismissed with costs.

LOWELL & WINTER,

Solicitors for Defendants, Maggie Ellen Parr, Julia Agnes Parr, and Ezra Wallace Farrow, a Minor, by G. G. Lee, His Next Friend.

JOHN McCOURT,

United States Attorney.

Answer. Filed August 17, 1910, *nunc pro tunc* as of June 14, 1910, by order entered on Aug. 17, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 17th day of August, 1910, as of and for June 14, 1910, there was duly filed in said court, a Replication, in words and figures as follows, to wit:

[Replication of Cross-complainant.]

In the Circuit Court of the United States for the District of Oregon.

LOUISE COLFAX,

Cross-complainant,

vs.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW, by G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor, ORVILLE D. TOWN-
SEND, E. L. SWARTZLANDER, and THE
UNITED STATES OF AMERICA, Trustee,
Cross-defendants.

For replication to the answer of defendants herein, comes now the cross-complainant by her solicitors, and reserving to herself the benefit of all proper admissions and disclosures contained in said answer, joining the issues upon said answer and every allegation thereof and this replicant is ready to prove all the matters contained in her cross-bill as this Honorable Court may direct.

FEE & SLATER,

Solicitors for Cross-Complainant.

Replication. Filed August 17, 1910, *nunc pro tunc*, as of June 14, 1910, in accordance, with an order entered on Aug. 17, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on Wednesday, the 17th day of August, 1910, the same being the 109th judicial day of the regular April, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, as of and for June 14, 1910, to wit:

[Decree.]

In the Circuit Court of the United States for the District of Oregon.

No. 3156.

LOUISE COLFAX,

Cross-complainant,

vs.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW, by G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor, ORVILLE D. TOWN-
SEND, E. L. SWARTZLANDER, and THE
UNITED STATES OF AMERICA, Trustee,
Cross-defendants.

This cause coming on at this time to be heard upon the motion of cross-complainant, in open court made for a decree in accordance with the decision of this Court rendered herein on the 14th day of June, 1910, the cross-complainant appearing by Fee and Slater, of counsel, and the defendants, Maggie Ellen Parr, Julia Agnes Parr and Ezra Wallace Farrow appearing by Lowell and Winter of counsel, and the

defendants, Orville D. Townsend, E. L. Swartzlander and the United States of America, Trustee, appearing by John McCourt, United States Attorney for the District of Oregon;

And it appearing to the Court from the pleadings and evidence in this cause that Isaac Gober, a mixed blood Indian belonging to the Walla Walla band of Indians located and residing upon the Umatilla Indian Reservation in Umatilla County, Oregon, was on or about the 12th day of April, 1893, allotted as Walla Walla No. 285, and at said time the South Half of the Southwest Quarter (S. $\frac{1}{2}$ SW. $\frac{1}{4}$) of Section Twenty-three (23), Township Three (3) North, Range Thirty-four (34) East Willamette Meridian, containing Eighty (80) acres, was allotted to said Isaac Gober;

And that thereafter the said Isaac Gober and Louise Colfax intermarried upon the Umatilla Indian Reservation in Umatilla County, State of Oregon, under the customs of the Indians residing upon said reservation and lived and cohabited together as husband and wife until on or about the 24th day of November, 1899, at which time the said Isaac Gober died intestate, leaving surviving him no lineal descendants, but died leaving surviving him the said Louise Colfax, who, at the time of the said death of the said Isaac Gober, was with child by him and about two weeks after the death of the said Isaac Gober, there was born to the said Louise Colfax a male child and the son of the said Isaac Gober, deceased, and that by reason of the death of the said Isaac Gober and father of the said male child, the

son of said Isaac Gober, the said male child became and was the sole heir under the laws of the State of Oregon of said Isaac Gober, and by reason thereof, became the owner in fee of the equitable title to said lands, subject only to the dower estate therein of the said Louise Colfax, which dower estate under the laws of the State of Oregon, consists of the right to the use of one-half of the said lands or the use of one-half the rents, issues and profits thereof during the life of the said Louise Colfax;

That thereafter, the said male child, the son of the said Isaac Gober and the said Louise Colfax, died in infancy, intestate and without any lineal descendants, and left surviving him the said Louise Colfax, his mother, as his heir under the laws of the State of Oregon; that by reason of the said death of the said male child, the son of the said Isaac Gober and the said Louise Colfax, the said Louise Colfax became the owner of the equitable title in fee of said lands under the said Act of Congress and the laws of the State of Oregon;

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the cross-complainant, Louise Colfax is, and has been ever since the death of said child of herself and the said Isaac Gober, deceased, the owner of the equitable title in fee of the land described in the complaint, to wit, the South Half of the Southwest Quarter (S. $\frac{1}{2}$ SW. $\frac{1}{4}$) of Section Twenty-three (23), Township Three (3) South, Range Thirty-five (35) East Willamette Meridian, containing eighty (80) acres which were allotted upon the Umatilla Indian Reservation to

Isaac Gober, a mixed blood Walla Walla Indian designated as Walla Walla No. 285, and as such owner is and has been entitled to the rents, issues and profits thereof; and that the United States of America, Trustee, holds the title thereto in trust for the said Louise Colfax, under the trust and conditions of the Act of Congress approved March 3, 1885, providing for the allotment of land upon the Umatilla Indian Reservation to the Indians residing and located thereon; and the defendants herein, Maggie Ellen Parr, Julia Agnes Parr, Ezra W. Farrow and Orville D. Townsend, otherwise known as Orville D. Sanders, have no interest in said land or in the rents, issues and profits thereof; and that the cross-complainant is the owner and entitled to all the moneys in the hands of the clerk of this court received from the defendant, E. L. Swartzlander, as rents, issues and profits of said land, remaining after all costs and expenses of this suit shall have been paid out of the same by the order of this Court, but that the said moneys shall not be disbursed until the further order of this Court.

Done and dated in open court at Portland, Oregon, this 17th day of August, 1910.

R. S. BEAN,
Judge.

Decree. Filed and entered Aug. 17, 1910, *nunc pro tunc* as of and for June 14, 1910. G. H. Marsh, Clerk.

And to wit, on the 2nd day of May, 1910, there was duly filed in said court, Testimony taken by Special Examiner, in words and figures as follows, to wit:

[Commission to Take Testimony.]

In the Circuit Court of the United States for the District of Oregon.

The President of the United States of America, to Mrs. Vida Johnston, of Pendleton, Oregon, Greeting:

KNOW YE, That we, in confidence of your prudence and fidelity, have appointed you special examiner, and by these presents do give you full power and authority diligently to examine upon their corporal oaths, or affirmations, before you to be taken, such witnesses in this cause as shall be produced before you by either of the parties hereto as witnesses on the part of the plaintiff or the defendant in a certain cause now pending undetermined in the Circuit Court of the United States for the District of Oregon, numbered 3156, wherein Rosa Parr is plaintiff and The United States of America is defendant, touching the premises, said testimony to be taken and reported to this Court within thirty days from April 6, 1910.

And we do further empower you to examine, on the same behalf, and in like manner, any other person or persons who may be produced as witnesses before you.

And we do require you, before whom such testi-

mony may be taken, to reduce the same to writing, and to close it up under your hand and seal, directed to the Clerk of the above-entitled court, at the City of Portland, Oregon; and that you return the same, when executed, as above directed, annexed to this writ, with the title of the cause endorsed on the envelope of the commission, into said Circuit Court, with all convenient speed.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 11th day of April, 1910, and in the 134th year of the Independence of the United States of America.

[Seal]

G. H. MARSH,
Clerk.

By J. W. Marsh,
Deputy Clerk.

[Testimony.]

*In the Circuit Court of the United States for the
District of Oregon.*

ROSA PARR,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Trustee,
Defendant.

S. A. LOWELL,

Attorney for Plaintiff,

JOHN McCOURT,

United States Attorney, for the Govern-
ment.

[**Testimony of Rosa Parr, Plaintiff, in Her Own Behalf.**]

ROSA PARR, called in her own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by JUDGE LOWELL.)

Q. Are you the plaintiff in this case?

A. Yes, sir.

Q. What is your present name?

A. Rosa Saunders.

Q. What was your name when this suit was begun?

A. Rosa Parr.

Q. Have you recently been married?

A. Yes, sir.

Q. Where do you now reside?

A. Toppenish, Washington.

Q. What is your age?

A. 38.

Q. Where were you born?

A. The Dalles, Oregon.

Q. Did you ever reside on the Umatilla Reservation?

A. Yes.

Q. When?

A. Well, I was raised there.

Q. When did you leave there?

A. Five years ago.

Q. Are you connected by blood with either of the tribes upon the reservation?

A. I belong to the tribe of Walla Walla.

Q. What proportion of Indian blood in your veins?

A. I am a half breed.

Q. Are you an allottee upon the reservation itself?

A. Yes.

(Testimony of Rosa Parr.)

Q. Did you know Isaac Gober in his lifetime?

A. Yes, sir.

Q. What was your maiden name?

A. Rosa Gober.

Q. What relationship, if any, did you bear to Isaac Gober? A. He was my half brother.

Q. Is he living or dead? A. He is dead.

Q. When did he die?

A. He died November the 24th, 1899.

Q. Did you see him after he was dead?

A. Yes, sir.

Q. Where did he die?

A. He died here in Pendleton.

Q. What other brother and sisters did he have at the time of his death?

A. I was the only sister.

Q. Did he have any brother at the time of his death? A. No, sir.

Q. Was his mother living? A. No, sir.

Q. Do you know who his father was?

A. I was told his father's name was Nor-west.

Q. State what you know as to whether or not your mother was married to Nor-west when Isaac was born. What have you been told about that?

A. I was told that she was never married to him.

Q. What conversation, if any, did you ever have with your father about Isaac being his child or not?

A. Well, we had trouble before about the same land. And it was attorney Carsen that wrote to my father and wanted him to appear and he answered me in the letter and told me that he wasn't the father

(Testimony of Rosa Parr.)

of Isaac Gober. That Isaac Gober was only his stepson.

Q. Did you ever have any personal talk with your father about the matter?

A. No, sir, only through letters.

Q. What did you do with the letter you refer to?

A. I brought it in to Mr. Tom Hailey.

Q. And what was done with it then?

A. Why, Mr. Hailey kept it.

Q. Have you ever seen it since? A. No, sir.

Q. How long ago was that?

A. Oh, about seven years ago.

Q. You speak about having trouble over this land before, what do you mean by that?

A. They was a certain party that wanted the land.

Q. Was there a suit in court, is that the trouble you mean? A. Yes, sir.

Q. And was Mr. Tom Hailey your attorney then?

A. Yes, sir.

Q. Was it while this suit was going on that you gave him the letter or about that time?

A. No, it was after the suit was over.

Q. What effort have you made to find the letter?

A. Why, I asked Mr. Lowell to look for it when he went to Portland.

Q. Is Mr. Hailey now living or dead?

A. He is dead.

Q. How old, if you know, was Isaac Gober when your father married your mother? That is, what was the understanding in the family?

A. He was two years old.

(Testimony of Rosa Parr.)

Q. When your brother died did he leave any will?

A. No, sir, not that I know of.

Q. You say that he left no brothers or sisters except yourself. State what you know about your mother's and your father's children. How many there were, when they were born, and when they died.

A. Well, I know they was five. Three of them died before I have any memory.

Q. Did they die in infancy?

A. I couldn't say, I don't know.

Q. What I want to get at, Rose, is whether these dead brothers and sisters, except Isaac, ever lived to grow up.

A. I think they died, all young.

Q. Were you the youngest of the family?

A. I am the next to the youngest.

Q. State whether or not these children died while you were very young.

A. They was two born before me, and one after me.

Q. Did they all pass away before you were old enough to know them or not?

A. Yes, they died before I can remember.

Q. How old was Isaac when he died?

A. I couldn't say, I don't remember.

Q. How much older was he than you?

A. He was seven years older than me.

Q. You were born five years after your mother married your father?

A. Yes.

Q. Now, state what you know as to whether or

(Testimony of Rosa Parr.)

not Isaac left any wife or child.

A. No, sir, he didn't.

Q. There is a woman called Louisa who claims to be the mother of a child by Isaac and who claims to have been married to him according to Indian customs, do you know her?

A. Yes, I know her.

Q. State what Isaac's relations were with her, if you know.

A. Well, he stayed with her off and on, but never lived as man and wife.

Q. You state that he died in '99, in November, how long before he died was it that he first began to stay with Louisa? Off and on?

A. About a year or maybe more.

Q. Would you say two years, possibly?

A. I don't think so.

Q. Where were you living in the years from 1895 up to the time of Isaac's death?

A. I lived about 6 miles from town and straight north from the Agency.

Q. On the Umatilla Indian Reservation?

A. Yes.

Q. What was your name then?

A. Rosa Parr.

Q. And you were living with your husband in those days?

A. Yes, sir.

Q. Where did Isaac live during that period?

A. He lived everywhere.

Q. How frequently did you see him during that period?

(Testimony of Rosa Parr.)

A. Quite often he would come and visit me.

Q. Did he maintain any home of his own?

A. No, sir, he did not.

Q. Did he have an allotment on the reservation?

A. Yes, sir.

Q. Did he have any house on that?

A. He had a little old shack.

Q. State whether or not he lived there.

A. No, sir.

Q. Tell what you know about his living in Pendleton during those years, if at all.

A. Yes, he stayed in Pendleton most of the time.

Q. Where was his stopping-place in Pendleton, if you know?

A. He stayed the biggest part of the time with John Damon.

Q. Where did he die?

A. Back of John Damon's saloon.

Q. State whether or not he had a room there.

A. Yes, he did.

Q. Was there ever any ceremony or marriage or anything of the kind ever performed between Isaac and Louisa?

A. No, sir, there never was.

Q. Now state, if you know, whether there was any child ever born to the woman during the time that Isaac was staying with her off and on?

A. There was a child born six months after he died, which she said was his.

Q. State what you know, if anything, about the relations of the woman with other men, whether or not other men were staying with her off and on.

(Testimony of Rosa Parr.)

A. I couldn't say positively—but I heard that she was staying with other men.

Q. Was that during the period that Isaac was stopping with her from time to time?

A. Yes, sir.

Q. Is that child living or dead?

A. It is dead.

Q. When did it die?

A. It died when it was eleven months old.

Q. State whether or not there was any other child born to this woman during the period that Isaac was stopping with her off and on.

A. Not that I know of.

Q. Was Isaac ever married to any woman?

A. Yes, sir.

Q. To whom? A. To Anna Woodward.

Q. How long ago was that, before or after the allotment? A. It was before the allotment.

Q. And state whether or not he was divorced from the Woodward woman before the allotment?

A. Yes, he was divorced before the allotment.

Q. By the courts of Oregon?

A. Yes, sir.

Q. Now, were there any children born of that union? A. Yes, sir, there was, two.

Q. Are they living or dead?

A. They both died.

Q. State whether or not they died in childhood.

A. One was two years old, the other one died an infant.

(Testimony of Rosa Parr.)

Cross-examination.

(By Mr. McCOURT.)

Q. Did Louise live in that shack on Isaac Gober's allotment at any time? A. No, sir.

Q. Did Isaac commence living with Louise upon the Umatilla Reservation or upon the Yakima Reservation? A. On the Umatilla.

Q. Didn't he bring her over from Yakima?

A. Not that I know of.

Q. Wasn't she recognized generally among the Indians as the wife of Isaac Gober?

A. Perhaps she was among the Indians.

Q. Well, you were living out there among the Indians, you knew what was going on, didn't you?

A. I lived on the reservation, but not among the Indians.

Q. You were then the wife of Joseph Parr?

A. Yes, sir.

Q. Do you remember in 1907 of attending an Indian counsel on the reservation?

A. I don't remember that.

Q. Well, do you remember taking Mary Parr and Charley Nor-west to establish your right to the land?

A. Yes, sir.

Q. You remember Leo Sampson was there?

A. Yes, sir.

Q. You remember that both Mary Parr and Charley Nor-west made an affidavit before the agent?

A. Yes, sir.

Q. You were the interpreter, were you not?

A. Yes, sir.

(Testimony of Rosa Parr.)

Q. You remember that both Mary Parr and Nor-west stated that Louise was the wife of Isaac Gober by Indian customs?

A. I don't exactly remember what they did say.

Q. Let me hand you this paper and see if I can refresh your memory. (Hands paper.)

A. Well, it says here that he was married, but I don't think that was mentioned there that day.

Q. Don't you remember that you explained the affidavits to them after the affidavit was written?

A. I never read it to them?

Q. Didn't you sign it down at the bottom there?

A. Maybe I did, but I never read it to them.

Counsel objects as immaterial.

Q. You took these parties there to establish your right to the land? A. Yes, sir.

Q. And after they had given their testimony the Indian agents afterward refused to recognize your interest in the land? A. Yes, sir. A. *Yes, sir.*

We offer the affidavit above mentioned for the purpose of showing what occurred at the office of the Superintendent of the Umatilla Reservation at that time and the basis upon which the Indian Department refused to recognize title to the lands in question, in Rosa Parr, also for the purpose of showing the understanding had among the Indians as to the relationship between Isaac Gober and Louise.

Judge LOWELL.—Objected to as irrelevant and immaterial.

Affidavit received and marked Defendant's Exhibit "A."

(Testimony of Rosa Parr.)

Q. Louise commenced claiming this land as the widow of Isaac Gober, immediately or shortly after his death, did she not?

A. Yes, it was shortly after his death. I mean that is the first time.

Q. And she brought a suit in the State courts against you regarding this land?

A. Yes, sir.

It is stipulated between the parties by their counsel that Louise brought a suit in the State's Court for Umatilla County, Oregon, on the 1st day of March, 1902, against the plaintiff in this case and others, and thereafter, on the 18th day of December, 1905, Louise was adjudged to be in default in said cause for want of a reply, therein, whereupon, a decree was entered judging the plaintiff, Rosa Parr, to be the owner of the land involved in this suit and that she was the sole and only heir at law of Isaac Gober, deceased.

(Questions by Mr. SLATER.)

Q. Were you acquainted with Louise while Isaac was going with her? A. Yes, sir.

Q. Did not Isaac take Louise to your house and keep her there for a while, as his wife?

A. He brought her there about two days before he died.

Q. How long did she stay there?

A. She stayed with me four months after Isaac died.

Q. What did Isaac say to you, if anything, at that time about Louisa?

(Testimony of Rosa Parr.)

A. He never said anything.

Q. What did he say he brought her to your house for?

A. I asked him if it was his wife and he said, "Oh, just for a little while."

Q. Did he stay there with her?

A. I think he did.

Q. Did they occupy the same room?

A. They slept outside, I guess.

Q. Did they sleep together?

A. I couldn't swear to that, for I never seen them.

Q. They did not occupy a room in your house?

A. No, sir.

Q. Was there a tent in the *year*, or anything of that kind? A. No, sir.

Q. Was Louisa at your house when you first heard of Isaac's death? A. Yes, sir.

Q. You and Isaac are children of the same mother, are you not? A. Yes, sir.

Q. When you went to the Indian agent at the time referred to in Defendant's Exhibit "A," the wife referred to in that exhibit by the witnesses was this same Louisa, was it not? A. Yes, sir.

Q. And the child referred to was this same child of this Louisa, was it not? A. Yes, sir.

Redirect Examination.

Q. Who was agent at the time this affidavit was made which has been offered here?

A. Mr. Edwards.

Q. Who wrote the affidavit?

A. I don't remember, I think it was his clerk.

(Testimony of Rosa Parr.)

Q. Do you remember who dictated it?

A. No, sir.

Q. After the State court gave you this land how long did you hold it before the agent refused to let you retain it?

A. Well, I had it for a time after my brother died till we bought this.

Q. Well, who was the agent that refused to let you have the ranch any longer?

A. Mr. Edwards was.

Q. What was your father's given name?

A. John Gober.

Q. Where does he live now?

A. Nespleam, Washington.

Q. And what was your mother's maiden name?

A. Maggie Russie.

Q. Was your mother ever married before she married John Gober? A. No, sir.

Q. You stated that Isaac was married to the Woodward girl, *was ever* married to anybody else?

A. No, sir.

Witness excused.

[Testimony of Frank Parr, Sr., for Plaintiff.]

FRANK PARR, Sr., being called on behalf of the plaintiff and being first duly sworn testified as follows:

Direct Examination.

(Questions by JUDGE LOWELL.)

Q. How old are you? A. Don't know.

Q. About how old? A. About 70.

Q. Where do you live?

(Testimony of Frank Parr, Sr.)

A. I live right towards the agency.

Q. How long have you lived on the Umatilla reservation? A. About 25 years.

Q. Do you know a man by the name of John Gober? A. Yes.

Q. How long have you known him?

A. I have known him since down the Willamette.

Q. Fifty years ago?

A. Something like that.

Q. Did you know Maggie Russie? A. Yes.

Q. How long did you know her before she died?

A. I have known her since down the Willamette too.

Q. Is she living or dead? A. She is dead.

Q. State whether or not John Gober married Maggie Russie? A. They were together.

Q. When did you first see them together?

A. In Walla Walla.

Q. How long ago?

A. I don't remember about how long it has been, a long while ago.

Q. Where did John Gober and the woman come from when you first saw them together?

A. From the Willamette.

Q. What, if anything, did they say about just having been married? A. I don't remember.

Q. Did you know Isaac Gober? A. Yes.

Q. How old was he at the time you saw John Gober and the woman in Walla Walla?

A. I couldn't say.

Q. About two or three years old? A. Yes.

(Testimony of Frank Parr, Sr.)

Q. Who was understood among the French people to be the father of Isaac Gober?

A. Nor-west.

Q. What Nor-west, Frank Nor-west or Charley Nor-west? A. Don't know.

Q. How long did John Gober and Maggie Russie live after you knew them up here?

A. I don't know.

Q. Did they live on this reservation awhile?

A. I don't remember that.

Q. Did you ever see them after they came to Walla Walla? A. No.

Q. What is your wife's name?

A. Mary Parr.

Q. Is she able to come in here as a witness to-day?

A. She can't. Tried to get her this morning.

Q. Is she sick abed?

A. She walks around but then she is too weak.

Q. Could she give the testimony if we went out to her place? A. Yes.

Cross-examination.

(By Mr. SLATER.)

Q. Who was Maggie Russie's father?

A. Gus Russie.

Q. Was he a white man or a mixed blood?

A. He was a man from the Red River.

Q. Was he part Indian?

A. Half breed from Red River.

Q. Who was Maggie's mother?

A. One of the Nor-west.

(Testimony of Frank Parr, Sr.)

Q. What was she?

A. Her father was Iroquois and her mother was an Indian woman.

Q. Was she a full blood Indian woman?

A. Yes.

Cross-examination.

(By Mr. McCOURT.)

Q. What relation was the mother of Maggie Russie to the Nor-west who was said to be the father of Isaac Gober?

A. I don't know.

Q. Were they any relation?

A. I don't know.

Q. Where did this Nor-west live, that you speak about as the father of Isaac Gober?

A. I don't know.

Q. Was he a white man or an Indian?

A. I never saw him, just hear of his name.

Q. Do you know Charley Nor-west?

A. Yes.

Q. He is not the man is he?

A. No.

Q. Did you know Frank Nor-west?

A. No.

Q. Do you know whether he was the man or not?

A. No.

Q. You supposed when you first saw Maggie Russie and John Gober at Walla Walla that Isaac Gober was their child, did you not?

A. I didn't know.

Q. Did you know John Gober down in Willamette?

A. Yes.

Q. How long had you been up here when you first saw them at Walla Walla?

(Testimony of Frank Parr, Sr.)

A. I had been quite awhile, I don't remember.

Q. Did they live near you in Willamette?

A. No.

Q. Did you know Maggie in Willamette?

A. Yes.

Q. Did she have this child, Isaac Gober when you knew her in Willamette? A. No.

Witness excused.

[Testimony of Frank Gagnon, for Plaintiff.]

FRANK GAGNON, called in behalf of the plaintiff being first duly sworn, testified as follows:

Direct Examination.

(Questions by Judge LOWELL.)

Q. Where do you live?

A. I live in Toppenish.

Q. Did you formerly live in this county?

A. Yes, I lived here about 25 years.

Q. What is your age? A. 55.

Q. Did you know Isaac Gober in his lifetime?

A. Yes, sir.

Q. How long did you know him?

A. About thirty years.

Q. When you lived in this county did you live on the reservation? A. Yes, sir.

Q. Are you of French descent?

A. Yes, sir.

Q. Of what blood was Isaac Gober?

A. Well, I should judge he was between a half breed and an Indian.

Q. Well, do you mean by that that he was half

(Testimony of Frank Gagnon.)

blood Indian and half blood white?

A. No, his father was supposed to be an Iroquois and his mother a half breed.

Q. Did you know John Gober when he lived in this county, Rosa Parr's father? A. Yes, sir.

Q. How long did he live here?

A. That, I couldn't tell you, he lived here quite awhile.

Q. State whether or not he was a Frenchman, also. A. He was a half breed French.

Q. Did you know his wife Maggie?

A. Yes, sir.

Q. How long did you know her?

A. About the same time as I known him.

Q. Were they recognized as husband and wife by the people on the reservation?

A. Yes, I know them in Walla Walla first place.

Q. Did they live together as husband and wife there? A. Yes, sir.

Q. Do you know Rosa Parr, now Rose Saunders?

A. Yes, I know her since she was a little girl.

Q. Is she the child of John and Maggie?

A. I suppose so, she the only child they have.

Q. She was recognized as their child among the people? A. Yes, sir.

Q. Did you know the man Nor-west who was reputed to be the father of Isaac Gober? A. No.

Q. Was Isaac ever married? A. Yes, sir.

Q. To whom, if you know?

A. Annie Woodward.

Q. State whether or not he was afterwards

(Testimony of Frank Gagnon.)

divorced from her by the State courts.

A. I wasn't here at the time but he told me he was divorced.

Q. Were you here from 1895 to 1900?

A. I couldn't tell you that.

Q. Well, say 15 years ago did you live here?

A. Yes.

Q. And were you here ten years ago?

A. Yes, sir.

Q. Did you know Isaac Gober during the last years of his life? A. Yes.

Q. How intimately did you know him the last two years of his life?

A. I seen him pretty near every time I came to town.

Q. How often was that?

A. Well, that was once or twice a week.

Q. Where was he living then?

A. Well, I don't know. He lived everywhere, I guess.

Q. Did he have any established home during those years? A. Not that I know of.

Q. Did you know a woman by the name of Louise, that Isaac stayed with part of the time?

A. Yes, sir.

Q. State what you know about his stopping with her, if at all.

Q. Why, I have seen them several times together.

Q. Did they have any home together anywhere?

A. I don't know.

Q. Do you know where his allotment is?

(Testimony of Frank Gagnon.)

A. Which Isaac?

Q. Yes. A. Yes.

Q. Did he have any home upon that allotment during the last few years of his life?

A. He had a little log house there.

Q. Did he live in it?

A. I never knowed that he ever lived in it.

Q. When you used to come to town in those days where did you usually see Isaac?

A. Well, mostly around his father in law.

Q. You mean John Damon? A. Yes.

Q. When you say father in law, you mean step-father, don't you?

A. Yes, that is what I mean.

Q. John Damon married Isaac's mother?

A. Yes.

Q. Now, state if you can, whether or not Isaac lived there at Damon's place, had a room there in those last years of his life, that is, a room in the back part of the saloon?

A. Well, I couldn't say whether he lived there.

Q. You don't know whether he did or not?

A. No.

Q. You say that—saw him with the woman from time to time? State where you saw them together.

A. Here in town.

Q. On the street or where?

A. On the street.

Cross-examination.

(By Mr. SLATER.)

Q. Do you know whether or not this Louisa ever

(Testimony of Frank Gagnon.)

occupied the room back of the saloon?

A. No, sir, I don't know.

Q. What, if anything, did Isaac ever say to you about this woman Louisa?

A. Well, he told me that he was going to get her.

Redirect Examination.

Q. When did he tell you that, Frank?

A. Here in town.

Q. How long before he died?

A. I couldn't say how long before he died.

Q. Where was she at that time?

A. When he died?

Q. No, when he told you that?

A. She was in town.

Q. Do you know whether she was living with some other man, at that time, when he told you that?

A. Don't know.

Q. Well, now, should you say it was a year before he died, that he told you that, or six months?

A. I couldn't say how long they lived together.

Q. You never saw them together except here in town, did you?

A. Yes, I seen them here in Yakima.

Q. How many times did you see them together in Yakima?

A. Just one season in the hop picking time.

Q. Good many Indians gather there in hop picking, don't they?

A. Yes, thousands of them, I guess.

(Testimony of Frank Gagnon.)

Recross.

(Questions by Mr. SLATER.)

Q. Were they living together there when you saw them in Yakima?

A. I don't know, I couldn't tell as to that.

Q. Were they working in the hop fields?

A. I suppose they was but they was not in the same yard where I was.

Q. Did you have any conversation with Isaac at this time about Louise? A. No.

Witness excused.

[Testimony of Fred Parr, for Plaintiff.]

FRED PARR called on behalf of the plaintiff being first duly sworn, testified as follows:

Direct Examination.

(Questions by Judge LOWELL.)

Q. What is your name, age, residence and occupation?

A. Fred Parr, 39 next birthday. Live on the Umatilla Reservation. Farmer.

Q. What nationality are you?

A. I am mixed blood.

Q. French and Indian? A. Yes, sir.

Q. What proportion French?

A. Why, about three-quarter, I guess.

Q. You speak French? A. Yes, sir.

Q. How long have you lived upon the Umatilla Reservation?

A. I have lived off and on since '83.

Q. Did you know Maggie Gober, Rose Parr's

(Testimony of Fred Parr.)

mother? A. Yes, sir.

Q. You are a son in law of Rose, are you not?

A. Yes, sir.

Q. State whether or not you are acquainted with the Indians and mixed bloods generally upon the reservation?

A. Yes, I am pretty well acquainted with them.

Q. You have been so acquainted since '83?

A. Yes, sir.

Q. Did you know Isaac Gober in his lifetime?

A. Yes, sir.

Q. How many years were you acquainted with him? A. Since we first come here.

Q. Did he have some French blood in his veins, too? A. He had very little I guess.

Q. What was the general reputation among the people up on the reservation and mixed bloods as to who Isaac Gober's father was?

A. I have heard the old folks say often that he was a Nor-west but I never knowed what Nor-west.

Q. Are the Nor-west people French and Indian mixed, or what is that blood?

A. I think they are Iroquois.

Q. Do you know John Gober, Rose's father?

A. Yes, I got acquainted with him last fall.

Q. Where does he live?

A. In Nespealam, Washington.

Q. What relationship was there between Rose, the plaintiff, in this case and Isaac Gober?

A. Half brother.

(Testimony of Fred Parr.)

Q. That is, Isaac was her half brother?

A. Yes.

[Stipulation Re Decree of Divorce, etc.]

It is hereby stipulated and agreed in this connection, by and between the plaintiff the United States of America, Trustee, and Louisa, who claims to be the widow of Isaac Gober, deceased, plaintiff appearing by S. A. Lowell, her attorney, the Government by John McCourt, United States Attorney for the District of Oregon, and Louisa by Fee and Slater, her attorneys, that a decree of divorce was duly made and entered in the Circuit Court for the State of Oregon of Umatilla County in the year 1882, whereby, the bonds of matrimony then existing between John Gober and Maggie Gober were forever dissolved. And that the Complaint therein alleges that upon that date there was but one child living the fruit of said union, to wit: Rosa Gober.

And it is further stipulated and agreed that said Rosa Gober is the plaintiff in this case.

And it is further agreed as shown by the record in said divorce proceedings that said John Gober and Maggie Gober intermarried at The Dalles, Oregon, about the year 1866.

Q. How intimately did you know Isaac Gober in the last years of his life?

A. I seen him frequently, two or three times a week.

Q. Did you know a woman by the name of Louisa whom he had some relations with? A. Yes.

Q. State what you know about those relations, if anything.

(Testimony of Fred Parr.)

A. Well, I don't know much about it, I have never knowed them to be as man and wife.

Cross-examination.

(By Mr. SLATER.)

Q. What do you mean by saying that you never knew them as being as man and wife?

A. Because I never knowed them to be married.

Q. Did you know that they were living in cohabitation together? A. No.

Witness excused.

[Testimony of Rosa Parr, the Plaintiff (Recalled in Her Own Behalf).]

ROSA PARR, recalled on her own behalf, testified as follows:

Direct Examination.

(Questions by Judge LOWELL.)

Q. The complaint alleges that the Government of the United States denies your right to Isaac Gober's allotment and withholds it from you. State the facts regarding that.

A. Yes, the agent is the one that took it away from me.

Q. Which agent? A. Mr. Edwards.

Q. Do you mean the agent upon the Umatilla Indian Reservation? A. Yes, sir.

Q. How long has it been since you have received any of the rents from the land?

A. I think it was just before Edwards was agent.

Q. The last rent you received was just before Edwards came in, was it? A. Yes, sir.

[Stipulation Re Allotment of Land, etc.]

It is hereby stipulated by and between the plaintiff herein, The United States of America, Trustee, and Louisa who claims to be the widow of Isaac Gober, by their attorneys herein appearing, that the allotment of lands in severalty to the Indians upon the Umatilla Indian Reservation including the allotments made to the plaintiff herein and to Isaac Gober were made April 24, 1891, under authority from the Secretary of the Interior bearing that date and that the schedule thereof was approved by said official Feb. 12, 1893, and that thereafter declaration of trust sometimes called trust patents were issued bearing date September 16, 1899. And that a copy of said declaration of trust covering said Isaac Gober allotment is as follows:

[Declaration of Trust.]

Walla Walla. 285.

THE UNITED STATES OF AMERICA.

To all whom these presents shall come, GREETING:

WHEREAS, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated March 27, 1893, from the Acting Commissioner of Indian Affairs, approved by the Acting Secretary of the Interior April 12, 1893, whereby it appears that under the provisions of the Act of Congress approved March 3, 1885 (23 Stats. 340), Isaac Gober ————— or —————, an Indian residing upon the Umatilla Reservation Oregon, has been allotted the following, described land, viz.: The South half of the South West quarter

of section twenty-three in Township three North of Range thirty-four east of the Willamette Meridian in Oregon, containing eighty acres.

NOW, KNOW YE, That the United States of America, in consideration of the premises and in accordance with the provisions of the first section of said Act of Congress of the 3rd March, 1885, HEREBY DECLARES that it does and will hold the land thus allotted (subject to all restrictions and conditions contained in said first section) for the period of twenty-five years, in trust for the sole use and benefit of the said Isaac Gober ————— or —————, or in case of his decease, for the sole use of his heirs, according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

IN TESTIMONY WHEREOF, I, William McKinley, President of the United States of America, have caused these Letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, this 16th day of September, in the year of our Lord one thousand eight hundred and ninety-nine, and of

the Independence of the United States the one hundred and twenty-fourth.

By the President, WILLIAM McKINLEY.

By F. M. McKEAN, Secretary.

[Seal]

C. H. BRUSH,

Recorder of the G. L. O.

Recorded Vol. 2, p. 67.

—and that all the others were in date, form and substance the same.

[Statement by Judge Lowell.]

Judge LOWELL, attorney for plaintiff in the case, having been sworn at his own request, makes the following statement:

Regarding the letter which plaintiff testifies she gave to Judge T. G. Hailey in his lifetime, I have made, at her request, a thorough search among the papers left by Judge Hailey pertaining to this case and the kindred case of Ellen Parr vs. John Damon, and have asked the firm of Chamberlin, Thomas and Kramer of Portland, Oregon, of which firm Judge Hailey at the time of his death was a member to send me all the papers in their possession bearing upon these cases, and they advised me that they have done so; and I have been unable to locate the letter.

Judge Hailey and I dissolved partnership in December, 1905, and his papers at that time were packed up and later moved to Portland, and I presume this letter was then either lost or destroyed. I am unable to find any tract of it.

[**Testimony of Louise, Defendant, in Her Own Behalf.**]

LOUISE, called on her own behalf, being first duly sworn, testified as follows:

Direct Examination.

(Questions by J. R. SLATER.)

Q. What is your name? A. Louisea.

Q. How old are you? A. Don't know.

Q. About how old are you?

A. She says she can't say hardly, but she thinks between thirty and forty.

Q. Are you a full blood Indian woman?

A. I am a full blood Indian.

Q. Where were you born?

A. At Yakima.

Q. To what band or tribe of Indians do you belong? A. I belong to the tribe I was born.

Q. Was that the Yakima band of Indians?

A. Yes.

Q. Did you know Isaac Gober? A. Yes.

Q. Did you ever live with Isaac Gober as his wife? A. Yes.

Q. When did you commence to live with him as his wife?

A. About—near as I can remember it is about 13 years ago.

Q. How long was it before Isaac died?

A. I lived with him for four years.

Q. Where were you when you commenced to live with him?

A. I first met him here on the Umatilla Reservation.

(Testimony of Louise.)

Q. What did he say to you about being his wife?

A. When I first met the man he requested me to be his wife and that he would have me for his wife as long as he lived or as long as I lived.

Q. What did you say to him?

A. I told him that I was willing to become his wife if he meant it for sure.

Q. What did he say to that?

A. He then told me that he was willing to have me for his wife and then I also said that I was willing to have him for my husband.

Q. Did you and Isaac Gober then commence to live together as husband and wife? A. Yes.

Q. Was Isaac part Indian? A. Yes.

Q. Was he living at that time upon the Umatilla Reservation?

A. Yes, he was on the Umatilla Reservation at that time. At the place where the Indians celebrate their 4th of July.

Q. Was he at that time a member of the Walla Walla band of Indians?

A. Yes, I knew he was.

Q. Was that the way that the people that belong to the Walla Walla band of Indians got married at that time?

A. At that time some of the Walla Walla Indians got married in that way and some of them were legally married.

Q. Where did you go to with Isaac to live with him?

A. We went to a place where the Indians used to

(Testimony of Louise.)

celebrate the 4th of July. We went to man's house who is here now.

Q. Whose house was it that you went to?

A. He-yem-ke-pe.

Q. Did you ever go with Isaac to the house of Rosa Parr?

A. Yes, I went to that house once and lived with them there for a short while.

Q. How long was that before Isaac died?

A. This was four years prior to the death of my husband.

Q. Did you have any children by Isaac Gober?

A. We had two children.

Q. Are they living or dead?

A. One of the children died before the father and the other after the father.

Q. When was the youngest child born?

A. My youngest child was born about two weeks after the death of his father.

Q. Where were you when the youngest child was born?

A. At that time I was stopping at He-yum-ke-pe's house.

Q. What is the English name of He-yum-ke-pe?

A. I don't know, his name very well all I know they call him Moses.

Q. Is he living now on the Umatilla Reservation?

A. Yes, he is living there.

Q. Were you living at Moses' house when your husband died?

A. No.

Q. Where were you?

(Testimony of Louise.)

A. We came to town one day and he was feeling a little sick and we was stopping here in town and he died here in town. And I was with him at the time.

Q. When you commenced to live with Isaac Gober and continued to live with him as his wife was that before or after the allotments on the Umatilla Reservation?

A. That was prior to the allotment that I commenced to live with him.

Q. Had not Isaac Gober already been allotted when you commenced to live with him?

A. Yes, he had been allotted.

Q. You did not mean to say that Isaac had not been allotted when you first married him?

A. I meant to say that the Indians had their allotments just about the time I commenced to live with him.

Q. Isaac already had his land, had he not?

A. Yes, he had already his allotment.

Q. Have the agents of the Umatilla Indian Reservation ever paid you any of the rent money coming from Isaac's land? A. No, never.

Q. Have the agents ever recognized you as being the widow of Isaac Gober?

A. Yes, the Indian agents recognize me as the widow of Isaac Gober.

Q. Have they ever allowed you to take possession of his land?

A. They told me that I ought to have possession of that allotment.

(Testimony of Louise.)

Q. Why did they not give it to you?

A. The reason why the Indian agent would not allow me to do as I pleased with this allotment, is because that a sister of Isaac Gober was claiming the land at the time.

Q. Have you married since Isaac died?

A. No. I never married again after Isaac died.

Q. Hasn't she got a husband now?

A. Why, I am married now and I have a husband.

Q. What is his name?

A. Schuyler Colfax.

Q. Where do you live at the present time?

A. At Yakima.

Q. Is Schuyler Colfax an Indian? A. Yes.

Q. Were you married to him according to the Indian customs or according to the white man's way?

A. I am married to this man in the white man's way.

Cross-examination.

(Questions by Judge LOWELL.)

Q. How many years ago was it that you first came to the Umatilla Reservation from Yakima?

A. I don't remember how many years it is but I think that it is 19 years.

Q. How soon after you came here did you and Isaac begin to live together?

A. I couldn't say. I don't remember.

Q. How old were you when you first came to the Umatilla Reservation?

(Testimony of Louise.)

A. I don't know how old I was at the time.

Q. Were you a young woman?

A. I don't know.

Q. Were you grown up? A. Yes.

Q. Now, how many snows was it after you came before you and Isaac began to live together?

A. This was about three years before I lived with him.

Q. How many snows did you live with him?

A. Four years.

Q. And how many snows has Isaac been dead? Ask her if she remembers whether he died in the fall of 1899 or not? A. About 12 years ago.

Q. Can you reckon time?

A. The witness remains silent.

Q. After you came to the Umatilla Reservation did you live with any other man according to Indian customs, except Isaac Gober?

A. I wasn't married to any other man according to Indian customs and the husband that I mentioned a short while ago was the only man that I lived with according to Indian customs.

Q. Well, didn't you live with some men on the Umatilla Reservation beside Isaac?

A. No, I didn't live with any other man here on the reservation, but I only had one husband here.

Q. Where did you and Isaac make your home after you and he began to live together?

A. At He-yum-te-pe's place.

Q. How long did you live there?

A. We live there most of the time.

(Testimony of Louise.)

Q. Is that man here in the room?

A. Yes, he is around here.

Q. What is his English name? A. Moses.

Q. Moses Johnson? A. Yes.

Q. Did you and Isaac live in Pendleton part of the time?

A. No, most of the time we lived at He-yum-te-pe's place but we used to come to town sometimes.

Q. Did you ever live with Isaac in Pendleton, over here in the back room of John Damon's saloon?

A. No, never, but we used to come to town as everybody does.

Q. Did you live four snows at Moses Johnson's place?

A. Yes, we lived there up to the time he died.

Q. Did you ever live with Ed Chapman?

A. No.

Q. Do you know an Indian by the name of Francis? A. No, I don't know him by that name.

Q. You lived at Moses Johnson's all the time?

A. Yes.

Witness excused.

[Testimony of Moses Johnson, for Defendant.]

MOSES JOHNSON, called on behalf of the defendant, being first duly sworn testified as follows:

Direct Examination.

(Questions by Mr. SLATER.)

Q. State your name. A. Moses Johnson.

Q. How old are you? A. Oh, about 39.

Q. Where do you live?

(Testimony of Moses Johnson.)

A. The other side of the agency.

Q. On the Umatilla Reservation?

A. Yes, sir.

Q. Which band of Indians do you belong to?

A. Belong to the Cayuse.

Q. Are you acquainted with the woman who was just upon the witness-stand before you?

A. Yes.

Q. Did you know Isaac Gober in his lifetime?

A. I used to know him.

Q. Did Louisa ever live at your house, with Isaac Gober?

A. Well, they used to come there, stay there, a little while.

Q. For how long did that continue?

A. They used to visit my place quite often.

Q. For how many years did that visiting continue?

A. I don't remember for certain but I think it is three or four years.

Q. Were Louisa and Isaac living together at that time as husband and wife, according to the custom of the Indians upon the Umatilla Reservation?

A. Yes, there were living together as husband and wife according to Indian custom.

Q. Did they live that way together until Isaac died?

A. I think that they lived that way up to the time that Isaac died.

Q. During that time did Louisa have any children by Isaac, that you know of?

(Testimony of Moses Johnson.)

A. I only remember that they had one child and I don't remember the other.

Q. What became of that child?

A. It died.

Q. Was that the one that was born and died before Isaac died?

A. That child that I knew died after the death of its father.

Q. Was it born before Isaac died?

A. I think that is the child born after its father died.

Cross-examination.

(By Judge LOWELL.)

Q. You and Isaac Gober were schoolmates, weren't you? A. Yes.

Q. When he came to your house did he come to live or to visit?

A. When they got married why, they came there to my house. They came to live there.

Q. Well, how long did they stay there the first time?

A. I don't know just how long they remained there but I think they remained about three months.

Q. How long was that before Isaac died?

A. I don't remember. I couldn't state how long before that, that was.

Q. Where did they go to when they left your house?

A. After they left my house I think they went to his sister's place. But I am not certain as I didn't follow behind them to see where they had went.

(Testimony of Moses Johnson.)

Q. Did they ever come back to your house again?

A. Yes, they used to come there after that and stay with me for a short while, then they would go away again.

Q. Did they ever have a home of their own, while you knew them?

A. No, I have never known that they had a home of their own, but her mother had a house about opposite the Indian agency and they would go to live there, sometimes.

Q. How much did they live there?

A. I don't hardly know how long they used to stay at her mother's place but I think that one time they remained all through the winter.

Q. Where did Isaac die?

A. I don't know anything about where he died as I was in Wallowa that summer.

Q. Was that ten years ago last fall that you were in Wallowa?

A. I don't know, I couldn't state how many years ago that was, as I used to visit Wallowa nearly every year.

Q. Did you hear that Isaac was dead when you got home?

A. Yes, I learned from the Indians that Isaac had died.

Q. Now, how many years ago was that?

A. I couldn't say for certain, but as near as I can guess I think that this was about 18 or 19 years.

Q. You think Isaac Gober died 19 years ago?

A. I am not certain but I am just guessing.

(Testimony of Moses Johnson.)

Q. Well, you are guessing at all of your testimony are you not?

A. I am not guessing of this statement I make, but where I don't remember for sure I say that I don't know for sure, and whenever I know the facts that I state just as I know.

Q. Do you have any idea of time at all?

A. I remember for a while, and then finally I forget.

Q. You don't remember for a matter of fact, how long before Isaac died that he and this woman visited you, do you?

A. I don't know hardly and then I wouldn't say for sure but then I think about three years.

Q. You know just about as much about that as about when Isaac died, don't you?

A. I stated a short while ago that I wasn't sure that he died that year.

Q. Well, you are not sure of anything, are you?

A. Yes, of course, I forget some what happened in those days and what I knew. I would say that I know this as a fact, but whenever it comes that I don't know for sure I say that I think that this happened about that time.

Q. Do you know what year this is?

A. 1910.

Q. Well, now, if you know what year this is, don't you know what occurred ten years ago, when it affected your own friends?

A. Well, I did know but I did not try to remember the year in which he died as I never thought that

(Testimony of Moses Johnson.)

I would be questioned about his death.

Q. Well, you are just as sure as you are of the length of time that he visited you before he died, are you not?

A. Yes.

Redirect Examination.

(Questions by Mr. SLATER.)

Q. Did Isaac Gober ever go with you into the Wallowa?

A. Yes, when they first were married they came to my place and it was the same summer that he came to Wallowa with me and after we came home he then left me and went across the river.

Q. Did Louisa go with him to Wallowa?

A. Yes, they both went with me.

Q. How long were you gone on that trip?

A. I think about three or maybe four months.

Q. Were Louisa and Isaac together all that time and living together as husband and wife?

A. Yes, I used to think that they were living as husband and wife.

Witness excused.

[Testimony of Phillip Minthorn, for Defendant.]

PHILLIP MINTHORN called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. SLATER.)

Q. State your name. A. Phillip Minthorn.

Q. How old are you?

A. I think that I am about 60 or 67.

Q. What band or tribe of Indians do you belong to? A. Cayuse tribe of Indians.

(Testimony of Phillip Minthorn.)

Q. Did you know Isaac Gober in his lifetime?

A. Yes.

Q. Do you know Louisa? A. Yes.

Q. Do you know whether Isaac Gober and Louisa ever lived together on the Umatilla Reservation as husband and wife?

A. Yes, I knew that they were living together as husband and wife but they never lived with me.

Q. Did they have any children that you knew of?

A. I only saw that they had one child.

Q. Was that before or after Isaac died?

A. This was after Isaac died.

Q. Do you know whether the child died or not?

A. This child died.

Q. After the allotments upon the Umatilla Indian Reservation what was the custom among the Indians in getting married?

A. The same as before the allotment and even *as* present time some of them marry according to the olden time.

Q. Was it and is it yet customary among the Indians on Umatilla Reservation for a man and a woman to agree with each other to be husband and wife, and then to live together as husband and wife?

A. Yes.

Cross-examination.

(By Mr. LOWELL.)

Q. You are a member of the Presbyterian church, are you not? A. Yes.

Q. How many years have you been a member?

A. I think that about pretty near 30 years, I know

(Testimony of Phillip Minthorn.)

for sure that it is over 20 years.

Q. Your people have had a mission on the reservation for 20 years, haven't they? A. Yes.

Q. Hasn't your church always required its people to get married according to the law of the State?

A. Yes.

Q. You have been a member of the Indian court upon the reservation, haven't you? A. Yes.

Q. Since the allotment hasn't that court required the Indians to be married according to law?

A. Yes, the Indian court requires the Indians to get married by law, but Indians don't want to do it sometimes.

Q. How long has the Catholic mission been upon the reservation?

A. It has been here for a good many years, I think about, maybe, 40 years. I am not certain, but I think it is about 40 years or it might be 30, don't know which.

Q. Isn't it a fact that since the allotment the Catholic people have required their people to get married according to the State law? A. Yes.

Redirect.

Q. Many of the Indians on the reservation do not belong to either Presbyterian church or the Catholic church, do they? A. Yes.

Witness excused.

[Testimony of Luke Minthorn, for Defendant.]

LUKE MINTHORN, called on behalf of the defendant, and being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SLATER.)

Q. State your name. A. Luke Minthorn.

Q. How old are you?

A. I don't know my age.

Q. About how old are you? Are you over fifty years old?

A. All he knows that Phillip Minthorn is older than he is.

Q. How many years older?

A. I don't know anything about it.

Q. You are more than 21 years old, are you not?

Admitted that the witness is about 50 years of age.

Q. Are you a full blood Indian? A. Yes.

Q. What tribe do you belong to?

A. Cayuse.

Q. How long have you lived on the Umatilla Reservation?

A. For a good many years, when I first came to this place I was only a boy then.

Q. Were you acquainted with Isaac Gober?

A. Yes, I knew him.

Q. Do you know Louisa, who was on the witness-stand here? A. Yes, I know her.

Q. State whether you know that Louisa and Isaac

(Testimony of Luke Minthorn.)

Gober ever lived together upon the Umatilla Reservation as husband and wife?

A. I heard that Louisa was his wife, but I never saw them living together, myself.

Q. Was that before or after the allotment?

A. After the allotment.

Q. Did Isaac and Louisa ever visit you at your home, together? A. No, never.

Q. Is it customary upon the Umatilla Reservation, and has it been, since the allotments for an Indian man and an Indian woman to agree with each other to live together as husband and wife and then to go on and live together as husband and wife?

A. Yes.

Q. Is that according to the old custom that prevailed before the allotment?

A. Yes, that is the old custom among the Indians.

Cross-examination.

Q. Isn't it a fact that since the allotment the Catholic church and the Presbyterian church have required their members to be married according to the laws of the State and church?

A. Why, if a man and woman wished to be married they lived together and whenever they conclude that they should marry by the church or according to the laws of the State, why, they do so.

Q. You are an Indian policeman, are you not?

A. Yes.

Q. Hasn't the Indian court, since the allotment required the Indians to marry according to law?

A. At present time the agent or superintendent

(Testimony of Luke Minthorn.)

does not give us any instructions regarding legal marriages.

Q. How long have you been on the Indian police force?

A. Ever since that the Indian court was started.

Q. When the court was established and for some years after, didn't they try to compel all the Indians to be married according to law?

A. Yes, they required the Indians to be married legally and most of them have been married according to the State law.

Q. Do you know when Isaac Gober lived with this woman, how many years after the allotment?

A. I don't know when they first began to live together at all. I saw this woman when she visited my house one day and she had a child with her. That was after that man died.

Q. Well, at that time, was the Indian court in organization?

A. Yes, sir, and I was a policeman for some time before this woman came to visit my place.

Q. You don't understand me, what I mean is, how long had the court been running when the woman came to your house?

A. The court had been running for a long time, before this woman came to visit my place.

Witness excused.

[Testimony of Charley Van Pelt, for Defendant.]

CHARLEY VAN PELT, called on behalf of the defendant, being first duly sworn, testified as follows.

Direct Examination.

(Questions by Mr. SLATER.)

Q. State your name.

A. Charley Van Pelt.

Q. How old are you? A. 37.

Q. Where do you live?

A. I live three miles above town. Pendleton.

Q. Do you live upon the Umatilla Reservation?

A. Yes, sir.

Q. Are you a member of one of the bands of Indians located upon the Indian Reservation?

A. No, sir.

Q. How long have you lived upon the Reservation? A. 14 years.

Q. Are you a married man? A. Yes, sir.

Q. Is your wife a member of either of the tribes located upon the Umatilla Reservation?

A. Yes, Umatilla.

Q. Are you in part of Indian blood?

A. Yes, sir.

Q. Did you know Isaac Gober in his lifetime?

A. Yes, sir.

Q. Do you know Louisa? A. Yes.

Q. Do you know whether she and Isaac Gober ever lived together as husband and wife upon the Umatilla Indian Reservation? A. Yes.

Q. When was that?

(Testimony of Charley Van Pelt.)

A. That was since I came here 14 years ago.

Q. Do you know whether or not there was any children born to them? A. Yes, sir.

Q. How many

A. One was born to them while they were both living and the other was born shortly after the death of this father.

Q. Were they living together at the time of Isaac's death? A. Yes, sir.

Q. Did you see Isaac after he was dead?

A. No, sir.

Q. About how long did they live together?

A. I remember four years.

Q. Since you have lived upon the Umatilla Reservation, state, if you know, what has been the custom among the Indians about getting married.

A. According to the Indian custom as they used to live together without getting married by law.

Q. How would they get to understand each other in regard to that matter?

A. They understand in this way, they say that this is the Indian way to get married.

Q. Would the Indian men ask the Indian woman to be his wife and live with him as such?

A. Yes, an Indian man ask Indian woman if she could make up her mind to live with him, then they get married by the Indian way. If not it would be all right with them.

Cross-examination.

Q. About when did Isaac die, Charles?

A. Eleven years ago.

(Testimony of Charley Van Pelt.)

Q. That would be ten years ago last fall, did he die in November, '99?

A. He died 1899, but I couldn't say for sure what month.

Q. You came here then about '95 or '6?

A. I come 14 years ago.

Q. Fourteen years ago about now?

A. Fourteen years ago coming fall.

Q. Now, when you came to the reservation, isn't it a fact that there were a good many Indians getting married according to law?

A. There were just only Christians married by law.

Q. Wasn't the Indian court then trying to induce all of the Indians to get married according to the laws of Oregon? A. Yes.

Q. Isn't it a fact that all, almost all, of the Walla Walla tribe of Indians are members of the Catholic church? A. No, sir.

Q. Well, about what part of them, half?

A. About one-fourth.

Q. Now, about how many of the Cayuse are members of the Catholic church?

A. The most of them.

Q. About how many of the Umatillas?

A. None.

Q. About how many of the Cayuse are Presbyterians? A. None.

Q. About how many of the Umatillas are Presbyterians? A. The most of them.

Q. Now, what about the condition of affairs when

(Testimony of Charley Van Pelt.)

you came? A. It was about the same.

Q. And has continued that way up to the present time? A. Yes.

Q. Can you tell me about what proportion the people on the reservation are mixed bloods and how many are full bloods?

A. The mixed bloods are one-third.

Q. That was about the same proportion when you came? A. Yes.

Q. Now, isn't it a fact that most of the mixed bloods on the reservation have always gotten married according to the laws of the State?

A. No.

Q. Do you think that the proportion would be about the same among the mixed bloods as among the full bloods? A. Yes, sir.

Witness excused.

It is admitted by all parties that Isaac Gober died some time in the fall of 1899 probably in November 4th as is alleged in the complaint.

[Testimony of Captain Sumpkin, for Defendant.]

CAPTAIN SUMPKIN, called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SLATER.)

Q. What is your name?

A. Captain Sumpkin.

Q. How old are you? A. 67.

Q. Are you a full blood Indian? A. Yes.

Q. How long have you lived on the Umatilla

(Testimony of Captain Sumpkin.)

Reservation? A. Since I am a boy.

Q. Did you know Isaac Gober in his lifetime?

A. Yes.

Q. Did you know him when Louise and he were living together upon the Umatilla Reservation?

A. I did.

Q. How many children were born to them?

A. I seen a little child of their and one that wasn't born yet.

Q. Did you see this child after it was born?

A. I saw her after the child was born.

Q. Was that before or after the allotments?

A. After the allotment.

Witness excused.

[Stipulation Re Testimony of Mary Ann Parr.]

It is hereby stipulated and agreed by and between the parties hereto, defendant being represented by J. R. Slater, plaintiff by S. A. Lowell, that Mary Ann Parr for whom was issued a subpoena is ill at her home upon the Umatilla Reservation and unable to attend upon this court and that if she were present and sworn she would testify as a part of plaintiff's case in chief as follows:

State of Oregon,

County of Umatilla,—ss.

I, Mary Ann Parr, being first duly sworn, say that I am the wife of Frank Parr; that I live on the Umatilla Indian Reservation; that I am part Indian blood, and that I have lived on said reservation a long time; that I am probably more than seventy

years old and that I am sick and unable to go from home; that I know Rosa Saunders, who was formerly Rosa Parr; that I am not related to her except that she was at one time the wife of one of my sons; that I knew her father, John Gober, and her mother Maggie Gober; that her mother's maiden name was Maggie Russie; that I knew them when they were young; that they came to my home immediately after they were married, and that Maggie then had a boy probably about two years old, who was born to her before she was ever married, and he is the boy who was afterwards known as Isaac Gober, and who died in Pendleton, Oregon, in the fall of 1899; that the father of said boy was understood to be a man by the name of Norwest, and that I always understood that John Gober never claimed to be his father; that John Gober and Maggie Gober were afterwards divorced, and later Maggie married John Damain, and died while she was living with him; that I knew her well all her life, and know that all her children except Isaac and Rosa died in childhood.

I further say that I knew Isaac Gober all his life, and know that he was a half brother to Rosa Saunders, formerly Rosa Parr; that he died in young manhood between ten years and eleven years ago; that at the time of his death he left no mother, brother, or sister except said Rosa, and I do not know whether his father was living or not. He, Isaac, was an illegitimate child of his mother as I have always been informed. He left no wife to whom he was legally married, but there was an Indian woman named Louisa with whom he lived

more or less for the last two years of his life, and after he died there was a child born to her; that he just lived with her as Indians used to live without any marriage either by church or state; that Isaac was part Indian and had an allotment on the Umatilla Reservation; that except as stated Isaac left no wife or child, and that said child died in infancy.

her

MARY ANN X PARR

mark

Witnesses to her mark:

FRED PARR.

Mrs. IDA BUSHMAN.

And that she would say further that said Isaac Gober was born near Oak Grove in the Willamette Valley in the State of Oregon.

And that if she were asked whether or not she signed the original affidavit of which Defendant's Exhibit "A" is a copy she would answer yes.

[Testimony of Rosa Parr, the Plaintiff, in Her Own Behalf (in Rebuttal).]

ROSA PARR called in rebuttal in her own behalf, testified as follows:

Direct Examination.

(By Mr. LOWELL.)

Q. Did you hear the testimony of an Indian woman Louisa, given in this case? A. Yes, sir.

Q. She stated that about four years before her husband died she lived with you for a short while, what are the facts about that?

A. No, sir, she never, because I didn't know her at that time.

(Testimony of Rosa Parr.)

Cross-examination.

(By Mr. SLATER.)

Q. When was it she lived with you?

A. She never lived with me at all. But she came there a couple of days before my brother died.

Witness excused.

[Stipulation Re Testimony of Joseph Craig.]

ROSA PARR

vs.

UNITED STATES OF AMERICA, Trustee.

It is hereby stipulated and agreed by and between the parties hereto, plaintiff appearing by Stephen A. Lowell, her attorney, and defendant by Fee & Slater, attorneys for the claimant, Louisa, that Joseph Craig, an Indian, has heretofore testified herein, and that in some manner his testimony has been lost from the files; and that he therein stated in substance that he knew Isaac Gober in his lifetime, and that he and said Isaac were personal friends, that he also knew Louisa, and knew that Isaac and Louisa lived and cohabited together as husband and wife according to Indian custom during the last two years of Isaac's life, and knew that Louisa had a child born to her after Isaac died, and that she claimed that Isaac was the father of the child, and that the child died in infancy.

STEPHEN A. LOWELL,

Attorney for Plaintiff.

FEE & SLATER,

Attorney for Defendant.

In the Circuit Court of the United States for the District of Oregon.

ROSA PARR,

Plaintiff,

vs.

UNITED STATES OF AMERICA, Trustee,
Defendant.

Certificate [Re Testimony, etc.].

State of Oregon,
County of Umatilla,—ss.

I, Vida Johnston, deputy clerk of the above-entitled court, and the person to whom the above-entitled cause was heretofore referred for the taking of testimony, do hereby certify that there appeared before me for such purpose Stephen A. Lowell as attorney for plaintiff, John McCourt, United States Attorney for the District of Oregon, representing the United States as Trustee, and Robert J. Slater, representing an Indian woman named Louisa who claims an interest in said land, and that on Wednesday the 6th day of April, 1910, all parties being present by counsel as aforesaid, and the plaintiff and said Louisa being present in person, the taking of testimony was begun, and upon said date the following named witnesses, to wit: Rosa Parr in her own behalf and Frank Parr, Frank Gagon, Fred Parr, on behalf of the plaintiff were examined and the following named witnesses, to wit: Louisa on her own behalf and Moses Johnson, Phillip Minthorn, Luke Minthorn, Charley Van Pelt,

Captain Sumpkin, and Mary Ann Parr on behalf of the defendant, were examined, and that the most of said witnesses being unable to speak the English language, Fred Parr was duly sworn to interpret the testimony of Frank Parr, who spoke the French language, and Leo Sampson was duly sworn to interpret the testimony of the Indian witnesses, and all of said witnesses were duly sworn to tell the truth, the whole truth and nothing but the truth, and that thereupon an adjournment was had until the 13th day of April, 1910, when the testimony of the witness Joseph Craig was taken, and he having been sworn to tell the truth, the whole truth and nothing but the truth and the witness Joseph Craig speaking the English language, and thereupon further adjournment was had until the 16th day of April, 1910, when the rebuttal testimony of the plaintiff was taken and the testimony of Mary Ann Parr admitted as stipulated, and I hereby further certify that by agreement and stipulation of counsel made before me in open court the signatures of said witnesses to their respective testimony was expressly waived, and I further certify that the testimony hereto attached is the true and correct testimony of said witnesses, and each of them, and that the stipulations and admissions therein set forth are true and were made before me in open court and that the exhibit marked Defendants' Exhibit "A" is the only exhibit which was offered except so far as extended within the record, and I further certify that said evidence was taken, and whole thereof, at my office in room 12 of the Smith-Crawford Building in the City

of Pendleton, Umatilla County, Oregon, and that the record hereto attached comprises all the evidence in the case, and that each witness and each interpreter was by me duly sworn in the manner provided by law, and that each appeared before me in person at the time and place above *time and place above* noted and gave testimony as hereinabove set forth, and I further certify that the said testimony was by me taken and said record made pursuant to the commission to me issued out of the above-entitled court, which commission is hereto attached and made a part hereof.

Witness my hand at Pendleton, Umatilla County, Oregon, this 30 day of April, 1910.

VIDA JOHNSTON,
Referee.

[Affidavit of Mary Ann Parr.]

State of Oregon,
County of Umatilla,—ss.

I, Mary Ann Parr, being first duly sworn, say that I am the wife of Frank Parr; that I live on the Umatilla Indian Reservation; that I am part Indian blood, and that I have lived on said reservation a long time; that I am probably more than seventy years old, and that I am sick and unable to go from home; that I know Rosa Saunders, who was formerly Rosa Parr; that I am not related to her except that she was at one time the wife of one of my sons; that I knew her father, John Gober, and her mother Maggie Gober; that her mother's maiden name was Maggie Russie; that I knew them when they were young;

that they came to my home immediately after they were married, and that Maggie then had a boy probably about two years old, who was born to her before she was ever married, and he is the boy who was afterwards known as Isaac Gober, and who died in Pendleton, Oregon, in the fall of 1899; that the father of said boy was understood to be a man by the name of Norwest, and that I always understood that John Gober never claimed to be his father; that John Gober and Maggie Gober were afterwards divorced, and later Maggie married John Demain, and died while she was living with him; that I knew her well all her life, and I know that all her children except Isaac and Rosa died in childhood.

I further say that I knew Isaac Gober all his life, and know that he was a half brother to Rosa Saunders, formerly Rosa Parr; that he died in young manhood between ten years and eleven years ago; that at the time of his death he left no mother, brother, or sister except said Rosa, and I do not know whether his father was living or not. He, Isaac, was an illegitimate child of his mother as I have always been informed. He left no wife to whom he was legally married, but there was an Indian woman named Louisa with whom he lived more or less for the last two years of his life, and after he died there was a child born to her; that he just lived with her as Indians used to live without any marriage either by church or State; that Isaac was part Indian and had an allotment on the Umatilla Reservation; that ex-

cept as stated Isaac left no wife or child, and that said child died in infancy.

her

MARY ANN X PARR

mark

Witness to her mark:

FRED PARR.

Mrs. IDA BUSHMAN.

Testimony. Filed May 2, 1910. G. H. Marsh,
Clerk.

And afterwards, to wit, on the 10th day of December, 1910, there was duly filed in said court, a Petition for Appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW by G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor,

Plaintiffs,

vs.

LOUISE COLFAX, ORVILLE D. TOWNSEND,
E. L. SWARTZLANDER, and THE
UNITED STATES OF AMERICA, Trustee,

Defendants.

Petition for Appeal.

The above-named plaintiffs, Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow, by G. G.

Lee, next friend of the said Ezra Wallace Farrow, a minor, and the United States of America, Trustee, Orville D. Townsend and E. L. Swartzlander, above-named defendants, conceiving themselves aggrieved by the order and decree made and entered August 17th, 1910, *nunc pro tunc* as of June 14, 1910, in the above-entitled cause in the above-entitled court, do hereby appeal from said order and decree, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the records, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 9, 1910.

LOWELL & WINTER,
Solicitors and Attorneys for Plaintiffs in Error and
for Deft. Orville D. Townsend.

JOHN McCOURT,
United States Attorney and Solicitor for E. L.
Swartzlander, Deft.

Petition for Appeal. Filed December 10, 1910.
G. H. Marsh, Clerk.

And afterwards, to wit, on the 10th day of December, 1910, there was duly filed in said court, an Assignment of Errors, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW by G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor,

Plaintiffs,

vs.

LOUISE COLFAX, ORVILLE D. TOWNSEND,
E. L. SWARTZLANDER, and THE
UNITED STATES OF AMERICA, Trustee,

Defendants.

Assignments of Error.

Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow, by G. G. Lee, next friend of the said Ezra Wallace Farrow, a minor, plaintiffs, and Orville D. Townsend, E. L. Swartzlander and The United States of America, Trustee, defendants in the above-entitled suit, in connection with their petition for an appeal, makes the following assignments of error, which they aver occurred during the trial of the said cause:

I.

The Court erred in holding that Isaac Gober and

Louise Colfax, cross-complainant and one of the defendants herein, were legally married.

II.

The Court erred in holding that the said Louise Colfax was the wife of the said Isaac Gober.

III.

The Court erred in holding that the male child of the said Louise Colfax was the sole heir under the laws of the State of Oregon of the said Isaac Gober.

IV.

The Court erred in holding that said child of Louise Colfax became the owner of the equitable title in fee of the lands described in the bill of complaint, to wit: The South half of the Southwest Quarter (S. $\frac{1}{2}$ SW. $\frac{1}{4}$), of Section Twenty-three (23), Township Three (3) South, Range Thirty-five (35) East Willamette Meridian, which lands were allotted upon the Umatilla Indian Reservation, to said Isaac Gober.

V.

The Court erred in holding that upon the death of the said male child of the said Louise Colfax, the said Louise Colfax became the owner of the equitable title in fee of the lands last above described, under the Acts of Congress and the laws of the State of Oregon; that ever since the death of the said child, the said Louise Colfax was the owner in fee of the equitable title of said lands.

VI.

The Court erred in holding that said Louise Colfax was entitled and has been entitled to the rents, issues and profits of said lands, and erred in holding that

the United States of America, as trustee, holds the title to said lands in trust for the said Louise Colfax.

VII.

The Court erred in holding that the plaintiffs herein, Maggie Ellen Parr, Julia Agnes Parr and Ezra Wallace Farrow, have no interest in the said lands or any of the rents, issues and profits thereof.

VIII.

The Court erred in holding that the said Louise Colfax is entitled to all the moneys in the hands of the Clerk of the Circuit Court of the United States for the District of Oregon, received from E. L. Swartzlander.

IX.

The Court erred in holding and decreeing that complainant's bill be dismissed.

X.

The Court erred in not entering a decree dismissing cross-bill of Louise Colfax, one of the defendants herein.

XI.

The Court erred in refusing to grant plaintiffs the relief prayed for in their bill.

XII.

The Court erred in awarding to said Louise Colfax, costs herein, and the Court erred in not awarding costs to the plaintiffs herein.

Wherefore, the plaintiffs and appellants pray that the said decree be reversed and the Circuit Court be directed to dismiss the cross-bill; and the plaintiffs further pray that the Circuit Court be instructed to

enter such decree as is prayed for in the bill of plaintiffs.

LOWELL & WINTER,
Solicitors for Plaintiffs and Defendant Orville D.
Townsend.

JOHN McCOURT,
United States Attorney and Solicitor for E. L.
Swartzlander.

Assignments of Error. Filed December 10, 1910.
G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 10th day of December, 1910, the same being the 59th judicial day of the regular October, 1910, term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Oregon.

No. 3156.

December 10, 1910.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW by G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor,

Plaintiffs,

vs.

LOUISE COLFAX, ORVILLE D. TOWNSEND,
E. L. SWARTZLANDER, and THE
UNITED STATES OF AMERICA, Trustee,

Defendants.

Order Allowing Appeal, etc.

On this 10 day of December, 1910, the plaintiffs Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow by G. G. Lee, next friend of the said Ezra Wallace Farrow, a minor, and Orville D. Townsend, one of the above-named defendants, by Lowell and Winter, their solicitors, appearing in their behalf, and the United States of America, Trustee and E. L. Swartzlander, by John McCourt, United States Attorney for the District of Oregon appearing in their behalf, filed herein and presented to this Court, their petition praying for the allowance of an appeal intended to be urged by them in the United States Circuit Court of Appeals for the Ninth Circuit, entered

in the above-entitled cause, in the above-entitled court, on the 17th day of August, 1910, *nunc pro tunc* as of June 14, 1910, and also praying that a transcript of the records, proceedings and evidence of papers on which said decree was herein rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for said Ninth Circuit, and such other and further proceedings may be had as may be proper in the premises.

IN CONSIDERATION WHEREOF the Court does hereby allow the appeal prayed for in said petition.

CHAS. E. WOLVERTON,
Judge.

Order Allowing Appeal. Filed Dec. 10, 1910. G.
H. Marsh, Clerk.

And afterwards, to wit, on the 10th day of December, 1910, there was duly filed in said court, a Bond on Appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

MAGGIE ELLEN PARR, JULIA AGNES PARR,
EZRA WALLACE FARROW by G. G. LEE,
Next Friend of the Said EZRA WALLACE
FARROW, a Minor,

Plaintiffs,

vs.

LOUISE COLFAX, ORVILLE D. TOWNSEND,
E. L. SWARTZLANDER, and THE
UNITED STATES OF AMERICA, Trustee,

Defendants.

Bond on Appeal.

Know All Men by These Presents, that we, Maggie Ellen Parr, Julia Agnes Parr and Ezra Wallace Farrow, as principals, and The Pacific Surety Company as surety, acknowledge ourselves to be jointly indebted to Louise Colfax, appellee in the above cause in the sum of Five Hundred (\$500) Dollars, conditioned that whereas, on the 17th day of August, 1910, in the Circuit Court of the United States for the District of Oregon, in a suit pending in that court, wherein Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow were plaintiffs, and Louise Colfax, Orville D. Townsend, E. L. Swartzlander and The United States of America, Trustee, were defendants, a decree was rendered against the said plaintiffs, and the defendants Orville D. Townsend, E. L. Swartzlander and The United States of America, and

in favor of the said defendant, Louise Colfax, and the said plaintiffs and the said Orville D. Townsend, E. L. Swartzlander and the United States of America, having obtained an appeal to the Circuit Court of Appeals for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Louise Colfax, citing and admonishing her to be and appear before the United States Circuit Court of Appeals for the said Ninth Circuit at the City of San Francisco in said Circuit, on the 7th day of January, 1911, to do and receive what may pertain to justice to be done in the premises.

Now, if the said appellants shall prosecute their appeal to effect and answer all costs, if they fail to make their plea good, then the above obligation to be void else to remain in full force and virtue.

MAGGIE ELLEN PARR,
JULIA AGNES PARR,
EZRA WALLACE FARROW,

By J. P. WINTER,

Their Atty.

[Seal] PACIFIC SURETY COMPANY.

By THOMAS E. SMITH,

Its Attorney in Fact.

Attest: H. G. WHIPP,

Its Resident Assistant Secretary.

Approved by this 10th day of Dec., 1910.

CHAS. E. WOLVERTON,

Judge of the District Court of the United States for
the District of Oregon.

Bond on Appeal. Filed December 10, 1910. G. H. Marsh, Clerk.

[Certificate of Clerk U. S. Circuit Court to Record.]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, pursuant to the order allowing appeal do hereby certify that the foregoing pages, numbered from four to 128, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Maggie Ellen Parr and Julia Agnes Parr, Ezra Wallace Farrow, by G. G. Lee, next friend of said Ezra Wallace Farrow, a minor, plaintiffs and defendants in the cross-bill, against The United States of America, Trustee, and Orville D. Townsend, also known as Orville D. Saunders, and E. L. Swartzlander, defendants and defendants in the cross-bill, and Louise Colfax, defendant and plaintiff in the cross-bill, as the same may appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is Sixty-three and 80/100 dollars, and that the same has been paid on behalf of the appellants.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this 2d day of January, A. D. 1911.

[Seal]

G. H. MARSH,
Clerk.

[Endorsed]: No. 1937. United States Circuit Court of Appeals for the Ninth Circuit. Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow, by G. G. Lee, Next Friend of the Said Ezra Wallace Farrow, a Minor, and Orville D. Townsend, The United States of America, Trustee, and E. L. Swartzlander, Appellants, vs. Louise Colfax, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Oregon.

Filed January 5, 1911.

F. D. MONCKTON,
Clerk.

NO. 1937

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAY TERM, 1911

MAGGIE ELLEN PARR, et al,
Appellants.

vs.

LOUISE COLFAX,
Appellee.

BRIEF OF APPELLANTS

*Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow
and Orville D. Townsend.*

**Appeal from the United States Circuit Court for
the District of Oregon.**

*LOWELL and WINTER, Attorneys for Appellants
last above named.*

THE LIVE WIRE, PENDLETON, ORE.

FILED

MAR 27 1911

NO. 1937

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAGGIE ELLEN PARR, *et al*,
Appellants.

vs.

LOUISE COLFAX,
Appellee.

BRIEF OF APPELLANTS

*Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow
and Orville D. Townsend.*

Appeal from the United States Circuit Court for
the District of Oregon.

*LOWELL and WINTER, Attorneys for Appellants
last above named.*

STATEMENT OF THE CASE

This suit was instituted in the United States Circuit
Court for the District of Oregon, for the purpose of de-

termining who is entitled to the possession, rents, issues and profits of a certain tract of land located in Umatilla County, Oregon, upon the Umatilla Indian reservation.

The land involved a tract consisting of eighty acres, was allotted to Isaac Gober, a mixed blood Indian, under Act of Congress, approved March 3, 1885. This allotment to Gober was approved by the Commissioner of Indian Affairs on the 12th day of April, 1893. On or about the 24th day of November, 1899, said Isaac Gober died.

After his death and on June 4, 1907, Rosa Parr, one of the appellants, filed her complaint in the Circuit Court of the United States for the District of Oregon, praying for a decree declaring her to be the sole heir at law of said Isaac Gober, deceased, and as such, the owner of and entitled to the possession of said lands, so allotted to said Isaac Gober, and also entitled to all the rents, issues and profits of said lands. (Transcript of Record, page 4).

Said Rosa Parr died on or about the 15th day of May, 1910, and while said suit instituted by her was pending. At the time of her death said Rosa Parr left surviving her three children, Maggie Ellen Parr, Julia Agnes Parr and Ezra Wallace Farrow, and also a husband, Orville D. Townsend. On August 13, 1910, these three children, to-wit: Maggie Ellen Parr, Julia Agnes Parr and Ezra Wallace Farrow, filed a bill of revivor in said court, praying that the suit instituted by said Rosa Parr, having become abated by reason of her death, should be revived

and restored, and further praying for a decree declaring that the heirs of said Rosa Parr are entitled to the possession of the lands allotted to said Isaac Gober, deceased. (Transcript of Record, page 15.) To this bill of revivor an answer was filed, (Transcript of Record, page 22) by the United States of America, Trustee, Orville D. Townsend and Louise Colfax and E. L. Swartzlander, to which answer plaintiffs in said bill of revivor filed their replication, (Transcript of Record, page 26). On August 17, 1910, Louise Colfax filed a cross complaint. In this cross complaint said Louise Colfax is plaintiff and Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow, Orville D. Townsend, E. L. Swartzlander and the United States of America are defendants. (Transcript of Record, page 29.)

In her cross complaint said Louise Colfax claims to be the sole heir of said Isaac Gober and, therefore, entitled to the possession and use of the tract of land allotted to said Gober. An answer to this cross bill by the said cross defendants was filed, (Transcript of Record, page 45) and a replication to the answer, (Transcript of Record, page 53). On the 17th day of August, 1910, a decree was made and filed in this suit whereby it was determined that said Louise Colfax was the owner and entitled to the possession and usufruct of said land allotted to said Isaac Gober, (Transcript of Record, page 54). The testimony in this case was taken before a Special

Master and was returned without findings of fact or conclusions of law.

This case presents primarily a legal proposition. In her cross complaint said Louise Colfax claims that in the year 1895 she and said Isaac Grober, while residing upon the Umatilla Indian reservation, intermarried "by then and there agreeing with each other, under the laws and customs of said tribes of Indians located and residing upon the said Umatilla Indian reservation, to live and cohabit together as husband and wife." (Transcript of Record, page 39). In the answer to the cross complaint it is denied that said Isaac Gober and said Louise Colfax were ever married and it is alleged that the facts are that said Isaac Gober and Louise Colfax, by mutual consent, lived and cohabited together at different intervals between the ——— day of ————, 1895, and until said Isaac Gober died, and that they were never married pursuant to any laws of the State of Oregon, and were not married at all, unless living and cohabiting together by consent as husband and wife, as a matter of law, constitutes a marriage. (Transcript of Record, page 50). Rosa Parr, the plaintiff who first instituted this suit, was clearly the sole heir of said Isaac Gober, unless the relations which existed between Isaac Gober and the woman Louise Colfax amounted to a valid marriage. Therefore, there is presented first the question as to the effect of marriages according to Indian customs, entered into after al-

lotments of lands in severalty upon the Umatilla reservation.

ERROR.

We contend that the trial court erred in finding and holding that the said Louise Colfax was the lawful wife of the said Isaac Gober (see Transcript of Record, page 54); that the court erred in holding that the child which was born to said Louise Colfax was the heir of the said Isaac Gober, and that upon the death of said child Louise Colfax became the sole equitable owner of the lands allotted to said Isaac Gober. (For particular specifications of error see Transcript of Record, pages 118, 119 and 120).

INTRODUCTION.

This case is of great importance. The main question involved affects every Indian upon the reservation. The validity of an Indian marriage, according to Indian custom, or of an Indian divorce, according to Indian custom, after allotment, so far as we are able to ascertain, has never been determined by the Federal Courts, excepting in this and one other case, decided the same time this one was decided, and by the same court.

If the relations which existed between Louise Colfax and Isaac Gober, deceased, were meretricious only, then the land allotted to said Isaac Gober descended at the time of his death, under the laws of the State of Oregon, to said Rosa Parr, as his next of kin and sole heir.

BRIEF OF ARGUMENT.

1. Prior to conferring citizenship upon them and while living in their tribal relations Indian tribes were considered distinct communities, "domestic, dependent rations," and as such their domestic relations were governed by their own customs and laws. The State laws had no control over them.

Worcester vs. U. S., 6 Pet., 515, 8 Law ed., 483, 499, 500 and 508.

Kansas Indians, 5 Wallace, 537.

U. S. vs. Kagama, 118 U. S., 375.

2. And a marriage, therefore, then entered into between members of a tribe, according to the law or custom of such tribe, (such tribe constituting a separate nation) is valid, because the validity of a marriage is governed and controlled by the laws of the country where it is entered into.

Earl vs. Godley, 42 Minn., 361.

Kobogum vs. Jackson Iron Co., 76 Mich., 498.

3. The act of February 8, 1887, (24, Stat., 388, Sec. 6) has this provision: "That upon the completion of

said allotments and the patenting of lands to said allottees, each and every member of the respective bands or tribes of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law and every Indian born in the territorial limits of the United States, to whom allotment shall have been made, under the provisions of this act, **or under any law or treaty**, and every Indian born within the territorial limits of the United States, who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, and every Indian in Indian Territory is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian by birth or otherwise a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.” Under this act Indians may become citizens of the United States in three ways: (1) By being allotted under the provision of the Act of Congress of February 8, 1887. (2) Allotment under any law or treaty, including the act under which the Indians upon the Umatilla reservation were allotted. (3) By taking up within the limits of the

United States a separate residence and adopting habits of civilized life.

4. Therefore, when the allotments of the Umatilla Indian reservation were approved by the Secretary of the Interior, to-wit: on the 12th day of April, 1893, the allotted Indians became citizens of the United States, and by virtue of the Constitution became citizens of the State of Oregon.

5. The Indians upon the reservation having become citizens, their status has been changed and "the jurisdiction of the State over them for all purposes of government becomes full and complete."

Dick vs. U. S., 340. 52nd Law ed., 520.

In re Heff, 197 U. S. 88.

6. Therefore, after the allotment has been approved and citizenship has been conferred upon the Indians of the Umatilla reservation, they must enter into the marriage relation as provided by the law of the State where the ceremony is performed, and a marriage thereafter according to Indian custom, is void.

Hardy vs. LaDow, 83 Pacific, 401.

7. In this State a marriage must be made and en-

tered into with certain required formalities.

Section 5227, of Bellinger & Cotton's Code of Oregon, provides:

“Before any persons can be joined in marriage, they shall produce a license from the County Clerk of the county in which the female resides, directed to any person or religious organization or congregation authorized by this act to solemnize marriage, and authorizing such person, organization or congregation to join together the persons named as husband and wife.”

Section 5229 of the same Code provides:

“In the solemnization of marriage, no particular form is required, except that the parties thereto shall assent or declare in the presence of the minister, priest or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife.”

8. Without complying with these required formalities the marriage relation cannot be created within the State of Oregon.

Holmes vs. Holmes, 1 Sawyers, 99, 116, 117.

ARGUMENT.

There is no serious controversy about the facts in this suit. By the pleadings it is admitted that Isaac Gober was a mixed blood Indian, residing upon the Uma-

fila Indian reservation and that while residing upon the reservation there was allotted to him, pursuant to the Act of Congress, approved March 3, 1885, eighty acres of land; that at the time of this allotment was made Isaac Gober was unmarried and over eighteen years of age; that the allotment so made was approved by the Commissioner of Indian Affairs on the 12th day of April, 1893, and that a trust patent for the eighty acre tract was issued to said Isaac Gober; that on or about the 24th of November, 1899, Isaac Gober died and that at the time of his death his sole heir was either Rose Parr, his sister, who instituted this suit, or the unborn child of Louise Colfax, the cross complainant herein.

The testimony in this suit shows that during the last two or three years of his life Isaac Gober lived and cohabited with Louise Colfax, and that Louise Colfax at the time of said Isaac Gober's death was living with him and claimed that she was married to him; that sometime about the year 1895 she and Isaac Gober had agreed to become husband and wife, and thereafter lived and cohabited together as such, and that according to the Indian custom this constituted a valid and binding marriage.

The evidence also discloses that two children were born to Louise Colfax. One was born and died prior to the death of Isaac Gober, and the other was born shortly after the death of said Gober and died in infancy.

The testimony further discloses that it was the custom upon the reservation among the Indians to live together and cohabit together by consent, and that this constituted a marriage, according to Indian custom; that a large number of Indians upon the Umatilla Indian reservation since allotment of lands to them in severalty was made, entered into the marriage relation, pursuant to the laws of the State of Oregon, but that others lived together by mutual consent, without any marriage ceremony whatever.

It is alleged in the cross complaint of Louise Colfax, (see paragraph 9, page 37 of the Transcript of Record) that at the time of the allotment of the lands of the Umatilla reservation there were about 1045 Indians entitled to allotment on the reservation. Of these 393 belonged to the Cayuse tribe, 196 to the Umatilla tribe and 456 to the Walla Walla tribe, and that there were allotted to the Indians about 100,000 acres of land on said reservation, and that the heads of families of the Indians received 160 acres, the adults, not heads of families, 80 acres, and the infants 40 acres each; that about 50,000 acres of the reservation is still held for the use of the Indians on the reservation, in common.

In paragraph 11 of the cross complaint, (see Transcript of Record, page 38), it is averred that it is the custom of the Indians belonging upon the Umatilla reservation for the males and females to intermarry by merely

agreeing to live together and by cohabiting as husband and wife, without other or further ceremony, act or proceeding, and for a husband and wife to terminate the marriage relation and become divorced by agreeing to separate, or by either husband or wife ceasing to live with his or her consort, and that they may become divorced at will, without any proceeding or ceremony whatever.

In the answer to the cross bill, (see Transcript of Record, page 47), it is admitted and alleged that prior to the allotment of lands in severalty to the Indians upon the reservation, some of the Indians lived and cohabited as husband and wife, without any marriage ceremony, and by mere agreement, while the members of some of the tribes were married according to a certain ceremony which consisted of giving presents and feasts by the parents of the contracting parties, and that prior to allotment of the lands in severalty, according to custom, some of the Indians on the reservation lived and cohabited with a plurality of wives, without entering into the marriage relation, otherwise than by mutual consent and agreement, but it is alleged that since the allotment of lands a large majority of them, to-wit: about 70 per cent, have become and are married, pursuant to the laws of the State of Oregon, and that since the allotment some of the Indians upon said reservation still live and cohabit as husband and wife, without being married at all, except that they live together by mutual consent, but that those who

live together as husband and wife, without a formal marriage, do not exceed 30 per cent of the total number of Indians upon said reservation.

By the testimony it is shown that some of the Indians on the reservation still live and cohabit together as husband and wife, without attempting to be married pursuant to the requirements of the laws of the State of Oregon, and without any ceremony or proceeding except consent of the parties.

The testimony does not disclose just what portion of the Indians, after allotment, were married according to this Indian custom. The testimony of Charlie Van Pelt (Transcript of Record, page 106) shows that at the time when he came to the reservation, about 1895 or 1896, only Christians were married by law; that about one-fourth of the Walla Walla tribe were Catholics and the most of the Cayuse tribe were members of the Catholic church and that most of the Umatillas were Presbyterians, and that this was the condition at the time he came to the reservation, about 1895, and that the proportion among the mixed bloods who lived together, without being married by law, was about the same as that of the full blood Indians.

No contention is made on behalf of Louise Colfax that she and Isaac Grober were ever married, unless the fact she lived and cohabited with Isaac Grober after allotment of land to him and prior to his death, a period of two or

three or four years, amounted to a valid marriage. If it did, then we concede that she is entitled to lands in controversy. If not, we contend that under the laws of this State the lands of Isaac Grober, upon his death, would have descended to Rosa Parr, as his next of kin and sole heir. Therefore, the vital question was the effect of an attempted marriage, according to Indian custom, after allotment of lands in severalty to the Indians upon the Umatilla Indian reservation.

Both the judicial and political departments of our government have always recognized an Indian tribe as constituting a separate political body. The Constitution grants power to Congress "to regulate commerce with the nations, among the several states and **Indian tribes.**" The Government has always dealt with them as a separate people. Up to 1871 our Government frequently made treaties with the various Indian tribes in this country and carried on war with the Indian tribes as with a separate nation.

In the case of *Roff vs. Barney*, 168, U. S. 218, 221, our Supreme Court uses this language: "The condition of the Indians and the Indian tribes within the limits of the United States is anomolous. The tribes, though in certain respects regarded as possessing the attributes of nationality, are held to be. . . . domestic, dependent nations." This language or language to this effect is found in nearly all the decisions of the United States Supreme

Court, pertaining to Indians living in tribal relation prior to allotment.

For the benefit of the tribes, tracts of land were set apart by treaty or by law. These tracts are commonly known as reservations. The tribes had a right to the possession of the reservation. Their title consisted in the right of **occupancy by the tribe**. The individual Indian did not own any of the land or have any legal right to it, and when an individual Indian separated from his tribe, he no longer had any right to the use of the land upon the reservation. A member of a tribe, "although in a geographical sense born in the United States," is not a citizen. The clause in the Constitution: "All persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States," does not apply to Indians who are members of a tribe.

Elk vs. Wilkins, 112 U. S., 94.

The individual Indian owed no allegiance to the United States, but only to his tribe and its chiefs.

As separate nations, Indian tribes were permitted to make their own laws and to regulate and govern their domestic affairs. For this reason a marriage entered into between members of a tribe of Indians according to the custom of the tribe, constituted a valid marriage, under

the familiar rule of law that the validity of a marriage is controlled by the law of the country where it is entered into, and for the same reason a divorce between members of an Indian tribe or a separation, according to their custom, was recognized by both the Federal and State Courts.

Even polygamy among Indians belonging to a tribe, if according to the custom of the tribe, is lawful and upheld by the courts.

This was the status of the tribal Indians in this country up to the time that they became citizens. They were not subject to the laws of the State and were not entitled to the rights and privileges of a citizen. If, however, Indians became permanently separated from their tribes, they ceased to be a part of a tribe, and became subject to the laws of the State in which they resided.

In the case of the Eastern band of Cherokee Indians against the United States, (117 U. S., 288, 303) the Supreme Court held that those Cherokees in North Carolina who had dissolved their connection with the Cherokee Nation, when they refused to accompany the Cherokee Nation when it removed to the West, had no separate political organization. Of the 1100 or 1200 Cherokee Indians who remained in North Carolina when the Cherokee Tribe or Nation, pursuant to treaty, moved to their "new home" west of the Mississippi, the Supreme Court uses this language: "They ceased to be a part of the Cherokee Nation and henceforth they became citizens of

and were subject to the laws of the State in which they resided.”

On the Umatilla Indian Reservation allotments were made in accordance with the provisions of the act of March 3, 1885, (23 Stat. L., 340.) These allotments were approved by the Secretary of the Interior on the 12th day of April, 1893. As soon as the allotments were approved the allottees became citizens of the United States, by virtue of the act of February 8, 1887, (24 Stat., 388, Sec. 6) and by virtue of this act they “shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they reside.” After the allotments of lands to the Indians in severalty, the Government no longer deals with the tribes, as such, but with the individual Indian. The chiefs lose their authority. The Individual Indian no longer owes allegiance to his chief and his tribe, but to the United States and his State. If they should, after becoming citizens, still maintain or attempt to maintain their tribal relations, this could have no legal significance at all. We, therefore, contend that after the tribal relation becomes extinct, after they are made citizens of the United States, citizens of the State in which they reside, they can no longer make laws governing their domestic relations. There can be no marriage, according to Indian law or according to the customs of the tribe, because no separate political body exists which could enact laws; and for this reason their

marriages must be entered into and divorces, if any had, in conformity with the laws of the State of Oregon.

Nearly all of the Indians upon the Umatilla Indian Reservation were allotted and became citizens and subject to the laws of the State of Oregon. It would be certainly a strange anomaly to hold that, notwithstanding these Indians are citizens of this State, they may enter into the marriage relations or become divorced according to a custom which existed among the Indian tribe at a time when it constituted a separate nation, and to hold that these Indians may carry on polygamy or end their marital relations at the wish of either party, without the consent or sanction of the State of which they are citizens.

In the case in *Re Heff* the Supreme Court of the United States fully considered the effects of the act of February 8, 1887, (24 Stat. L., 388) and holds that an Indian allottee is a citizen of the United States and of the State in which he resides, and becomes subject to the laws, both civil and criminal, of the State where he resides.

Upon the Umatilla Reservation there were 1045 Indians, to whom was allotted in round numbers 100,000 acres of land. The heads of families received each 160 acres, persons over the age of 18 years 80 acres, orphan children under 18 years of age 80 acres, and to each child under 18 years, not otherwise provided for, 40 acres.

These allotments were made pursuant to the Act of March 3, 1885 (23 Stat. L., 340). After these Indians received their allotments and the same were approved, they became citizens of the United States and of the State of Oregon. The Government of the United States placed an agent upon the reservation to look after their interest and protect them, dealing with the individual Indians and no longer with the tribes, as a political body. The Indians by virtue of becoming citizens owed allegiance to the Government and none to their tribes or chiefs. They cannot be deprived of the right to the land allotted to them, even if the tribe, as such, should move entirely off of the reservation. To claim that, notwithstanding that all of these Indians are now citizens, and notwithstanding that they owe allegiance to the United States and to the State, they still are in a position to continue their tribal relations and to be members of some other nation and make their own laws, regulate their domestic and social affairs and absolutely disregard the laws pertaining to marriage and divorce of the State of which they are citizens, is almost absurd.

Many of these Indians have no regard for the marriage contract whatever. According to the old custom that prevailed among them they can become married by consent and cohabitation, and they can become divorced by separating at the wish or whim of either consort. One Indian may have one or more wives.

The allotments were made to assure stability of the family. The head of a family, whether husband or wife, as the case might be, received 160 acres, and yet if these Indians can become married and divorced, without any legal proceeding, excepting their own wish or consent, then the allotment to the head of a family of 160 acres gave no protection whatever to the other members of the family, because the head of the family might separate from his wife, without procuring any divorce, and lawfully marry another. His wife could not bring suit for a divorce, because the husband could allege that under the Indian law he was legally divorced from her by separating from her, and in this way, though the husband would have been allotted as the head of a family, his wife would not be entitled to support from him, and would have no proper remedy to compel him to support her or to pay her alimony.

If these tribal relations still continue after the Indians become allottees and citizens, have they still the power to carry on war? Would it be a defense for an Indian to claim that under the direction of his chief he had killed one of his co-citizens, a white man, off of the reservation, as was contended by the Indian known as "Plenty Horses?" and held in a case in South Dakota in 1890 (see Thayer essay, "A People Without Law.") This would certainly be an absurd situation.

We do not maintain that the United States has not the

right and the power to make regulations upon reservations. The title to land, though allotted to Indians in severalty, still remains to the Government, and as long as the title to the lands upon the Indian reservation remains in the Government it is Indian country, and the Government has jurisdiction over crimes committed in Indian country, and as long as the title to lands in Indian country remains in the Government and it is trustee, it has the right to make such regulations as it may deem wise for the purpose of fulfilling the trust. The fact that tribal regulations have been abolished does not take away from the Government the power to protect the Indians or make such regulations for their protection upon the reservation as may seem fit.

Taylor vs. Brown, 147 U. S., 640.

We, therefore, contend that allottees upon the Umatilla reservation must enter into the marriage relation as is required by the laws of the State of Oregon, and must comply with the laws in attempting to annul the marriage contract. In this State common law marriage is not permitted.

Holmes vs. Holmes, 1 Saw., 99.

The relations that existed between Louise Colfax and Isaac Gober, deceased, did not amount to a valid mar-

riage. The laws of the State of Oregon were not complied with, and Louise Colfax was not the wife of Isaac Gober.

However, it will be contended by counsel for Louise Colfax that Louise is entitled to the possession of this land and the use of the same, even if she was not lawfully married to Isaac Gober, for the reason that under the law of the United States this land descended to Louise's child which was born shortly after the death of Isaac Gober. This contention will be made under the amendment of 1901, (26 Stat. L. 795) which amends the fifth section of the Act of February 8, 1887, commonly known as the Dawes Act, which amendment is as follows: "That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indians have cohabited together as husband and wife according to the custom and manner of Indian life, the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child."

If this amendment to the act of 1887 affects the Slater Act, that is the Act of March 3, 1885, and is operative upon the Umatilla Indian reservation, then the child of Louise would become legitimate and Louise, its mother, would become the heir of the child and, consequently,

the lands of Isaac Gober, upon his death, would pass to the child, when born alive, and upon the death of the child would pass to Louise, its mother, and not to Rosa Parr and her heirs.

This amendment was considered by the Supreme Court of the State of Oregon in the case of McBean vs. McBean, 37 Ore., 195, and we believe that our Supreme Court there correctly determined that the amendment has no application to the Act of March 3, 1885, commonly known as the Slater Act.

It certainly is not reasonable to assume that when Congress amended the fifth section of the Dawes Act, the Act of 1887, in express language, it could be deemed to have intended to have amended any other act or that the language of said amendment could be regarded as applicable to any other act. Such would be contrary to every rule of statutory construction.

The reading of Section 5 of the Act of February 8, 1887, which appears on page 494 of the Third Volume of Federal Statutes Annotated, together with said amendment thereof, which appears at the bottom of page 501 of said volume, clearly indicates what the intention of Congress was.

In the case of McBean vs. McBean, 37 Ore., 195, (paragraph 4, page 206) the Supreme Court of the State of Oregon declared: "The act of 1885 was special in its nature, affecting none but the Umatilla Indian reserva-

tion and the confederate tribes inhabiting the same, while the act of 1887 was general in its purpose. It seems there was no intention of extending its provisions to the Umatilla reservation and Indians concerned. The allotments are made upon an entirely different basis and the acts are otherwise incongruous, so that the general act could not well supercede the special act, without repealing it, and no such intention is made apparent from the terms of the general act."

The Act of 1885 provides that the laws of alienation and descent of the State of Oregon shall apply. We, therefore, submit there was no valid marriage between Louise Colfax and Isaac Gober; that the child born to Louise was illegitimate and that the special amendment of 1901 to Section 5 of the Act of 1887 has no application to the Act of March 3, 1885, and, therefore, that the lands in question, upon the death of Isaac Gober, descended to his sister, Rosa Parr, and not to the unborn child of Louise Colfax. Therefore, the decree of the Trial Court should be reversed.

Respectfully submitted,

LOWELL & WINTER,

Solicitors for Appellants Maggie Ellen Parr, Julia Agnes Parr, Ezra Wallace Farrow and Orville D. Townsend.

NO. 1937

United States Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

MAY TERM, 1911

MAGGIE ELLEN PARR, *et al*
Appellants.

vs.

LOUIZA COLFAX,
Appellee.

BRIEF OF APPELLEE

LOUIZA COLFAX

Appealed from the United States Circuit Court for
the District of Oregon.

R. J. SLATER, Solicitor for Appellee.

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BRIEF OF APPELLEE

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Appealed from the United States Circuit Court for
the District of Oregon.

R. J. SLATER, Solicitor for Appellee.

STATEMENT OF THE CASE.

This is a suit brought in the Circuit Court of the
United States for the District of Oregon for the purpose

of determining who are or is the heirs or heir according to the laws of the State of Oregon, of Isaac Gober, deceased, a mixed-blood Indian who was a member of the Walla Walla band of Indians located and residing upon the Umatilla Indian Reservation, and who had allotted to him, as Walla Walla No. 285, the following described land, to-wit: The South 1-2 of S. W. 1-4, of Sec. 23, Twp. 3 N., R. 34, E. W. M., containing 80 acres.

The said allottee died about the 24th day of November, 1899.

The evidence shows conclusively that for about three or more years prior to his death the deceased and Louisa Colfax, the cross-complainant, lived and living together at the time of his death, upon the Umatilla Indian Reservation, and that such cohabitation and living together was in accordance with the recognized customs of the Indians among whom they lived, before and after allotment, and they had two children, one of whom was born and died prior to the death of Isaac, and the second, which was born and died after his death. He also left surviving him, his sister, Rosa Parr, the complainant in this suit, who claimed to be the only heir, and who died since this suit was commenced, and is succeeded by the appellants, who claim to be the only heirs and as such entitled to the allotment under Act of Congress approved March 3rd, 1885.

The appellee by her cross bill claims to be the only heir, by reason of being the mother and only heir of the posthumous child who died in infancy without lineal descendants.

POINTS AND AUTHORITIES.

I.

Under the allotment act for the Umatilla Indians, which was approved March 3rd, 1885 (23 Stat. L. 340), all lands allotted thereunder are held in trust by the United States for the original allottees or in case of their death for their heirs according to the laws of Oregon.

2.

The laws of Oregon recognize the marriages of Indians, upon the Umatilla Indian Reservation, between Indians, according to the Indian customs, before and after allotments, as valid, and the issue of such marriages is considered legitimate.

Kalyton vs. Kalyton, 45 Or., 116.

3.

Such is the general rule irrespective of allotments.

Johnson vs. Johnson, Adm. 30, Mo. 72 (77 Am. Dec., 798).

Earl vs. Godley, 42 Minn., 361, (44 N. W. 254).

People v. Rubin 90 N.Y. Supp. 787.

Austin vs. Sharpe, 12 Tex. Cir. App., 223 (33 S. W. 676).

4.

Whether or not such marriage is legal is immaterial in this case since by the Act of Congress, approved 1891, (26 Stat. L., 795) the children of such marriages and cohabitation are declared to be the legitimate heirs of the father.

By that act Congress recognized the validity of Indian marriages.

Kalyton vs. Kalyton, 45 Or., 116, 122.

5.

Indian citizenship does not deprive them of any of the rights and privileges as Indians.

Ells vs. Ross 12 C. C. A., 205; 29 U. S. App. 59. 64 Fed., 417.

U. S. vs. Longan, 105 Fed., 240.

U. S. vs. Flourney, etc., 69 Fed., 886.

U. S. vs. Millen, 71 Fed., 682.

U. S. vs. Belt, 128 Fed., 168.

U. S. vs. Kiya, 126 Fed., 878; Re Lincoln, 129 Fed., 247.

Mulligan vs. U. S., 56 C. C. A., 50; 120 Fed., 98.

ARGUMENT.

In view of the admitted facts and the authorities cited in this brief, it seems rather useless to present any argument, for there is practically nothing to argue.

The conclusion which the able counsel would have the court draw and fix in its decree, is that the United States by its Congress in enacting the allotment laws, wiped out all distinction between Indians who have become citizens and any other citizen, and that, therefore, there can be no distinction between Indian allottees and other classes of citizens, in the application of the laws of Oregon governing marriages.

This proposition assumes that the laws of the State of Oregon do make a distinction between marriages among Indians who are not allotted and other classes of citizens, and upon that point we are agreed, and we contend that the allotment acts do not change the status of the Indians in that respect at all and they are still entitled to their own peculiar customs in that regard. That is the full meaning and purport of the decision of Supreme Court of the State of Oregon in Kalyton vs. Kalyton, 45 Or., 116, and as pointed out by the same authority on page 122, Congress has expressly sanctioned that interpretation by enacting the amendment to the general allotment law of February 8, 1887, which amendment is quoted

in appellant's brief, and our contention therefore, anticipated.

The amendment is to the general allotment law and not to the special Allotment Act of March 3, 1885, under which the allotments upon the Umatilla Reservation were made, but it is, nevertheless, a legislative declaration and recognition of the law in Oregon and every other state, where it has been determined by the courts that Indian marriages under their own customs were legal.

The general allotment act of February 8, 1887, and the acts amending it declare the general policy of the United States in regard to Indian marriages and the children of such marriages, and notwithstanding the fact that the Umatilla Indians were allotted under a special act, the general act applies to the Umatilla Reservation, for it was passed after the special act.

I do not care to review the several decisions cited by counsel in the brief to show that the general allotment act conferred full citizenship upon Indian allottees, but will simply call the attention of the court to this, that none of them hold that an Indian allottee is deprived of any of his rights or privileges as an Indian, but they are entitled to all their rights as such.

Ells vs. Ross, 12 C. C. A., 205; 29 U. S. App., 59.
64 Fed., 417.

U. S. vs. Logan, 105 Fed., 240.

U. S. vs. Flourney Live Stock etc. Co., 69 Fed., 886.

U. S. vs. Mullen, 71 Fed., 682.

U. S. vs. Belt, 128 Fed., 168.

U. S. vs. Kiya, 126 Fed., 879.

Re Lincoln, 129 Fed., 247.

Mulligan vs. U. S., 56 C. C. A., 50, 120 Fed.. 98.

We insist that the validity of Indian marriages, and the legitimacy of the issue of such marriages, both before and after the allotments in the State of Oregon, are recognized by the courts of Oregon and also by congress.

Most respectfully submitted,

R. J SLATER,

Solicitor for Appelle.

No. 1937.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MAY TERM, 1911.

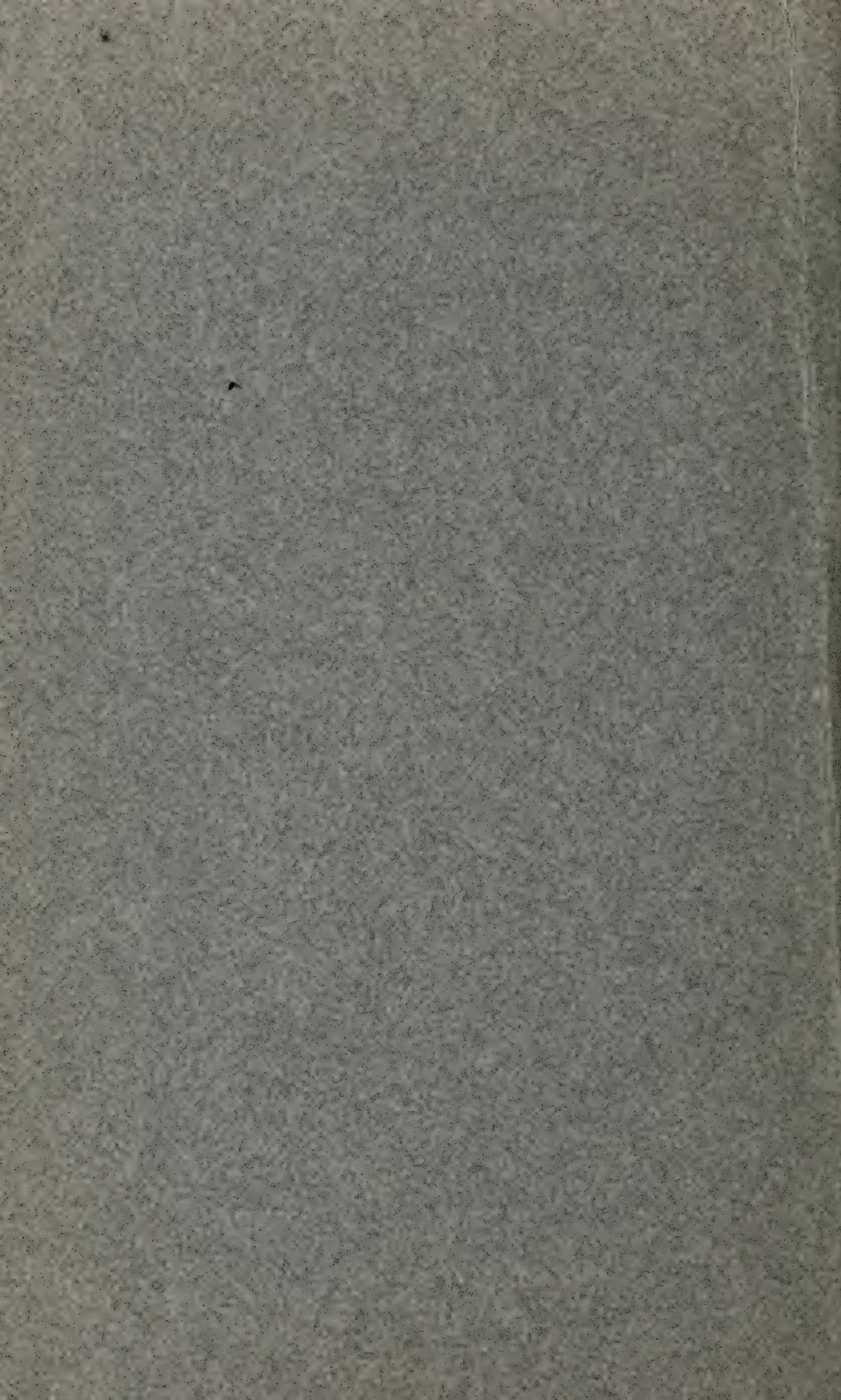
MAGGIE ELLEN PARR,	}
vs.	
LOUIZA COLFAX,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF OF APPELLEE,
LOUIZA COLFAX Upon Rehearing.

Appealed from the United States Circuit Court for the
District of Oregon,

R. J. SLATER, Solicitor for Appellee.

FILED



IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MAGGIE ELLEN PARR,
Appellant,

vs.

LOUIZA COLFAX,
Appellee.

Brief on Behalf of Appellee on Rehearing

POINTS AND AUTHORITIES.

1.

The Courts of the United States have jurisdiction to determine who are entitled to the lands of deceased Indian allottees.

Act of Congress approved Aug. 15, 1894, 28 Stat. L. 305.

Act of Congress approved Feb. 6, 1901, 31 Stat. L., 761.

Patawa vs. United States, 132 Fed., 893.

Parr vs. United States, 132 Fed., 1004.

Smith vs. United States, 152 Fed., 889; 166 Fed., 846.

McKay vs. Kalyton, 204 U. S., 458, 51 L. Ed., 566.

Beam vs. U. S., 162 Fed., 260.

2.

The statutes giving the remedy are remedial and are to be liberally construed.

Sloan vs. United States, 118 Fed., 283.

Hy-utse-mie-kin vs. Smith, 194 U. S., 401, 48 L., 1039.

3.

The right of the heirs of Indian allottees, upon the Umatilla Indian reservation to take the lands of their ancestors by descent is conferred by Act of Congress approved March 3, 1885. 23 Stat. L., 340.

Beam vs. U. S., 153 Fed., 414.

Smith vs. Bonifes, 154 Fed., 883.

4.

The rule of jurisdiction declared in McKay vs. Kalyton, 204 U. S., 458, 51 L. Ed., 566, is not changed by the Act of June 20, 1910, except to confer concurrent jurisdiction upon the Secretary of the Interior, because, jurisdiction thereby is given to the Secretary affirmatively merely, and the Courts are not ousted of their jurisdiction either directly or by implication.

Black, Courts and Interpretation of Laws, p. ~~128~~/38, § 37

12 Ency. of Pl. and Pr., 176.

~~11 Cyc., 882.~~

Endlich on Inter. of Statutes

Secs. 151, 152.

5.

A jurisdiction conferred upon a special tribunal does not oust that of the Courts of general jurisdiction, unless there be a plainly manifested intention of the legislature to that effect, to be derived from the words of the statute.

Fidelity T. Co. vs. Gill Car. Co., 25 Fed., 737.

6.

An Act conferring jurisdiction over a certain class of actions upon one court is not repealed by a subsequent act conferring jurisdiction upon another Court.

Gowen vs. Harley, 56 Fed., 987.

7.

Where there are two acts refering to the same subject effect is to be given to both if possible.

Chicago M. & St. P. R. R. Co. vs. U. S., 127 U. S., 406,
32 L. Ed., 180.

U. S. vs. Henderson, 11 Wall., 652, 20 L. Ed., 235.

Smithmeyer vs. U. S., 147, 343, 37 L. Ed., 196.

Chew. Heong vs. U. S., 112 U. S., 536, 28 L. Ed. 772.

8.

The words final and conclusive does not mean exclusive.

McGaher vs. Mathis, 21 Ark., 40.

9.

The term, "And his decision shall be final and conclusive," means that there can be nothing further done in the executive department.

Manix vs. Hamilton County Commrs., 43 Ohio St., 210,
1 N. E., 322.

10.

The Act of June 20, 1910, is not retroactive.

Murry vs. Gibson, 15 How (U. S.) 421, 14 L. Ed., 755,
756.

Chew Heong vs. U. S., 112 U. S., 536, 28 L. Ed., 770.

6 Am. & Eng. Ency. of L. (2nd ed.) 939.

*End with on Inter. of Statute
271, 288, 289,
State v Littlefield 93 N.E. 614*

ARGUMENT.

The rehearing in this case is for the purpose of enabling the Court to determine the question of jurisdiction.

As we understand it, the question now involved was suggested to this Court by a letter to His Honor, Judge Gilbert, by Hon. John McCourt, United States Attorney for the District of Oregon, under date of Feb. 8th, 1912, and we infer from the statements in that letter, a copy of which has been served upon

us, that it may be contended that the Court below did not have jurisdiction of this case by reason of the Act of Congress approved June 26th, 1910, as well as by the Act of Congress approved May 8, 1906, (34 Stat. L., 183), and it is also intimated that it might be considered an open question as to whether or not the United States Courts ever had jurisdiction of heirship cases under the Acts of Congress of August 15, 1894, and Feb. 6, 1901.

It seems therefore necessary for us to consider the question of jurisdiction at length and for that purpose we will present the propositions in the reverse order of that stated above, as follows:

First. Did the Act of Congress of August 15th, 1894, and Feb. 6, 1901, confer jurisdiction upon the Courts to determine the rights of the heirs of Indian allottees to the lands, originally allotted to their ancestors?

Second.—Did the Act of May 6, 1906, deprive the Courts of their jurisdiction if they had it prior to that date?

Third. Did the Act of June 26th, 1910, deprive the Courts of their jurisdiction if they had it at and prior to that date?

Fourth. If the Courts did have jurisdiction on and prior to June 26th, 1910, and were deprived of their jurisdiction by the Act of Congress of that date, did the Court below have jurisdiction to enter its decree in this case, *nunc pro tunc* as of the 14th day of June, 1910, which was the date the Court decided the case.

1st. We are therefore presented with four distinct questions, the first of which depends upon a proper construction of the Statutes of August 15, 1894, and February 6, 1901, which

are identical excepting that, the latter Act, so amends the first as to require the United States to be made "the party defendant."

The terms of the statute which we are to construe are as follows:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to allotment of land, under any allotment act, or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress, may commence and prosecute or defend any action, suit or proceeding, in relation to their rights thereto, in the proper Circuit Court of the United States. And said Courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdiction, and involving the right of any person, in whole or in part., of Indian blood or descent, to any allotment of land under any law or treaty."

Those terms are so general and inclusive that it is difficult to imagine how any person either professional or lay could ever conceive of any one claiming as original donors or as their heirs or descendants are either excluded or not included within its very beneficial purview.

"Any person in whole or in part of Indian blood or descent," certainly must include the heirs of persons who are in whole or in part of Indian blood, and there are no words of limitations or of exclusion of any kind anywhere in the statute.

The statute is remedial in that it supplies a very useful remedy where one did not exist prior to its enactment, and therefore it should be and has been liberally construed.

Sloan vs. United States, 118 Fed., 283.

Hy-use-mie-kin vs. Smith, 194 U. S., 401, 48 L. Ed. 1039.

It only remains to ascertain whether there is any Act of Congress or Treaty which confers rights to lands, upon the heirs of Indian allottees, and if there is any such law, the right bestowed upon such persons to invoke the jurisdiction of the United States Court becomes manifest. In this case the right is conferred by the allotment act of March 3rd, 1885, which provides:

“Be it enacted, etc., that the President of the United States shall cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing upon the Umatilla Reservation, in the State of Oregon, as follows, of agricultural lands:

“To each head of the family one hundred and sixty acres; to each single person over the age of eighteen years, eighty acres; to each orphan child being under eighteen years of age, eighty acres; and to each child under eighteen years of age not otherwise provided for, forty acres.” “The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon.” (23 Stat. at L. 340).

It has been determined by this Court that whoever the heir or heirs of an Indian allottee may be, whether of Indian blood in whole or in part, or entirely of white blood, they are entitled to the land so allotted by virtue of the statute of descent of the State of Oregon.

Beam vs. U. S., 162 Fed., 260.

And in the case of McKay vs. Kalyton, 204 U. S., 458, 51 L. Ed., 566, the Supreme Court of the United States held that the United States Court had exclusive jurisdiction of such cases, under and by virtue of the Acts of Congress now under consideration, although in that case the distinction between the rights of original allottees and the heirs of original allottees was not raised, for it was assumed by all parties to that suit that that particular point had been settled in other cases, particularly in the case of Smith vs. Bonifer, 153 Fed., 889, in which it was ably argued by the late Hon. T. G. Hailey, and in the opinion by the late Judge Bellinger it is held: "The patent is a mere declaration of trust, in which the intention that the heir shall take in the right of the allottee is shown," and upon that construction the judge held the complaint stated a good cause of suit as to F. H. Smith who was the heir of three of his deceased children. The case was affirmed by this court but the question of whether or not the statutes were broad enough to include cases of the heirs of the Indian allottees was not raised or discussed. 166 Fed., 846.

In the case of Parr vs. United States, 132 Fed., 1004, the point here presented was directly raised and elaborately argued, upon a demurrer to the complaint and the demurrer was overruled, the Court holding that the plaintiffs as the heirs of a deceased allottee had a right under the law to invoke the jurisdiction of the United States Courts under the Statute of 1894, (28 Stat. of L., 305), as amended by that act of February 6, 1910, (31 Stat. at L., 760).

In view of these cases and the plain reading of the statutes, it is clear that unless it was divested by subsequent legislation the Court below did have jurisdiction of the subject matter of this suit.

2nd. We pass to a consideration of the second question involved here, viz.: Did the Act of May 8, 1906, deprive the Courts of jurisdiction?

The purpose of that statute was to change the time when allottees should become citizens. The former statute fixed the time as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal of the State or Territory in which they reside."

(See general allotment Act approved Feb. 8, 1887, Sec. 6.)

And as the amendment does not expressly or by implication effect or change the status of allottees under the law prior to the time of the passage it can in no way have any application to the case at bar, for the record shows that the allotment in question was made in 1893, or about that time. But except in the manner above indicated the status of allottees made after its passage is in no way effected so as to deprive the United States Courts of their jurisdiction until patents in fee are issued and the Indian thereby entirely relieved from control by the United States. I find no suggestion in any case to the effect that the Act of May 8th, 1906, might have deprived the Courts of their jurisdiction. We therefore may confidentially dismiss the second question by ascertaining that the rule laid down by the Supreme Court in *McKay vs. Kalyton*, *supra*, is not changed by the Act of May 8th, 1906.

3rd. Now, did the Act of June 26th, 1910, deprive the courts of the jurisdiction which had been conferred upon them by the Act of August 15th, 1894, and as amended by the Act of Feb. 6th, 1901?

I am very confident that it does not. It certainly does not do so in direct, positive and unequivocal terms, and a reading of the Act, in the light of the law at the time of its enactment and the purposes intended by Congress, ought to, I think, convince any person that it only confers concurrent jurisdiction upon the Secretary of the Interior.

This question never arose in the case at bar prior to the decision in the lower Court for reasons which will hereafter appear, but subsequently to the decision it did arise in another case, *Bond vs. United States*, 181 Fed., 613, in which the writer of this brief had no interest, but at the time it was raised there were several cases pending of a like character to the *Bond* case, and several of them had been argued and submitted to Judge R. S. Bean, and in order to speed them he called upon all the attorneys for briefs upon this question, and thereupon the writer of this argument prepared a brief sustaining the position taken by him and every attorney having cases from the Umatilla Reservation, including Winter & Lowell, attorneys for the individual appellants in this case joined in that brief and I now present it to this Court, as being sufficient for the present purposes.

BRIEF UPON THE JURISDICTION OF THIS COURT OF CASES INVOLVING THE RIGHTS OF HEIRS OF INDIAN ALLOTTEES.

Whatever is said in this brief must be considered as applying to cases arising upon the Umatilla Indian Reservation, because all the cases in which the writers are interested arose upon that reservation, and the question now before this Court must be determined by considering the special statute under which the allotments upon that reservation were made, and also numerous cases which have been decided by this court, the Court of Appeals, and the Supreme Court of the United States.

The Act of Congress approved March 3, 1885, 23, Stat. L., 340, provides in Sec. 1 thereof, "The President shall cause patents to issue to all persons to whom allotments of lands shall be made under the provisions of this act, which shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or in case of his decease, of his heirs according to the laws of the State of Oregon, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever; Provided that the law of alienation and descent in force in the State of Oregon shall apply thereto after the patents have been executed, except as herein otherwise provided," etc.

And Sec. 6 thereof declares, "That the Secretary of the Interior shall have power to make needful rules and regulations to carry into effect the provisions of this act, *and shall have power to determine all disputes and questions arising between Indians representing their allotments.*"

Under the above provisions there can be no doubt but that originally the Secretary of the Interior, in the first instance, had **exclusive jurisdiction to determine** who the heirs of deceased allottees were; that question is definitely and for ever settled by the decision of the United States in *Hy-uts-mil-kin vs. Smith*, 194 U. S., 413, 48 L. ed., 1045, 24 Sup. Ct. Rep., 681, and in *McKay vs. Kalyton*, 204 U. S., 465, 51, L. Ed., 566, wherein the Supreme Court holds, "The sole authority for settling disputes concerning allotments resided in the Secretary of the Interior." "This being settled, it follows that prior to the Act of Congress of 1894 controversies necessarily involving a determination of the title, and incidentally of the right to the possession of Indian

allotments while the same were held in trust by the United States, were not primarily cognizable by any Court either State or Federal."

Now the terms of the Act of Congress of 1894 and the reenactment thereof of Feb. 6, 1891, (3 Fed. Stat. Ann., 504), are as follows: "That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper Circuit Court of the United States; and said Circuit Courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent to any allotment of land under any law or treaty and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant. And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him."

The first question to determine is, what claimants or classes of claimants are brought within the jurisdiction of this Court by this act?

The words of the Act seem plain and unequivocal; Congress meant just what it said, and the requirements are, the claimant must,

1. Be in whole or in part of Indian blood or descent.

2. Be entitled to an allotment under some law of Congress or must claim to be so entitled to land under some allotment Act or under some grant made by Congress, and

3. He must claim to have been unlawfully denied or excluded from an allotment or parcel of land to which he claims to be lawfully entitled by virtue of an Act of Congress.

That part of the Act defining the jurisdiction could not be more comprehensive, viz.: "And said Circuit Courts are hereby given jurisdiction to try and determine any action, suit of proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment," etc. These terms are certainly broad enough to include any person or class of persons claiming an allotment as the heir of an allottee for there are no words of exclusion of any such claimant, and there are no subsequent words in the statute which limit the meaning of the words which define the jurisdiction which was conferred upon the Courts. The last clause which requires that the judgment or decree shall be certified to the Secretary of the Interior and that it shall have the same force and effect as though the allotment had been made by the Secretary, was inserted in the Act of 1894 for the purpose of binding the United States, which under that act could not be made a party to the suit or action.

Ily-yu-tes-mil-kin vs. Smith, 194 U. S., 401, 48 L. Ed., 1039, those words only give effect to the judgment or decree and do not take away any of the force of any of the former provisions, neither is there any conflict of meaning which must be reconciled or construed. This interpretation was approved and applied by the Supreme Court in an heirship case, *McKay vs. Kalyton*, *supra*, wherein it is decided that the United States Courts have exclusive jurisdiction under the Acts quoted above.

Therefore, there can be no doubt but that the Acts of 1894 and 1901 do confer jurisdiction upon the United States Courts in such cases, and that such jurisdiction was, prior to the 28th day of June, 1910, exclusive of all other Courts or tribunals. Now upon the latter date Congress passed an Act which provides, "That when any Indian to whom an allotment of land has been made, or may hereafter be made, *dies* before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, *and his decision thereon shall be final and conclusive.*"

What effect has that statute upon the jurisdiction of this Court as conferred by the Acts of 1894 and 1901. is the question now presented.

One of the canons of the interpretation of statutes is a consideration of the law which existed prior to the enactment; we have done that in this matter and have found that originally the Secretary of the Interior had the exclusive jurisdiction, but that he was deprived of that jurisdiction and it was conferred upon the United States Circuit Court exclusively. *McKay vs. Kalyton, supra.*

That state of affairs was very embarrassing to the Department of Indian Affairs, for in the administration of the business of deceased allottees it is absolutely necessary that the Secretary of the Interior shall determine, in the first instance who the heirs of deceased allottees are or else the process of administration must necessarily stop; and again it is very apparent that under the present condition of the Indians upon the reservations in Oregon, a great majority of the cases would never be brought into court for various reasons, but princi-

gally, because there can be no doubt as to who the heirs are in many cases. *Patawa vs. United States*, 132 Fed. 893. And in many cases the heirs do not know of their interest and could not act, and in others minors without guardians or the possibility of guardians, could not act.

So that it is imperative that the Secretary of the Interior, for administrative purposes, should have the right and power in the first instance to determine who the heirs are of deceased allottees, and Congress, in taking away that right and jurisdiction by the enactment of the statutes of 1894 and 1901, probably went farther than it intended, and the law of June 15th, 1910, was intended to remedy the defect, not by depriving this court of the jurisdiction, but by giving the Secretary concurrent jurisdiction with the courts, for while there is an apparent necessity for the Secretary to have the right and power to determine who the heirs are in the first instance, there is a great necessity for the courts to have the same, or even paramount jurisdiction. That is very evident from the character of cases which are now pending before this court, wherein there are very many of the most intricate questions of fact and law involved, requiring the most careful judicial investigation in order to rightfully determine who the real heirs are in such cases, and therefore we contend that this act of June 20th, 1910, must be so interpreted as to sustain both jurisdictions, if possible, and such in the rule of construction.

"Where there are two acts relating to the same subject, effect is to be given to both, if possible."

Chicago M. & St. P. R. Co. vs. U. S., 127 U. S., 406, 32 L. Ed., 180

United States vs. Henderson, 11 Wall., 652, 20 L. Ed. 235

Smithmeyer vs. United States, 147 U. S., 343, 37 L. Ed., 169.

Chew Heong vs. United States, 112 U. S., 536, 27 L. Ed., 72.

The special act conferring jurisdiction upon the United States Circuit Courts was not repealed (*pro tanto*) by the Act of June 20th, 1910, which confers jurisdiction upon the Secretary of the Interior, and the two stand together, *Id.*

When jurisdiction is once conferred, it cannot be taken away by implication, but such a result can only be reached by express negative words or by irresistible implications from the terms of the statute. 12 P. & P., 176; ~~11 Cyc.~~, 928.

No statute will be construed as repealing a prior law, unless so clearly repugnant thereto as to admit of no other construction. *Cope vs. Cope*, 137 U. S., 682, 34 L. Ed. 832.

And "It is a general rule of law that a jurisdiction conferred upon a special tribunal does not oust that of the Courts of general jurisdiction, unless there be a plainly manifested intention of the legislature to that effect, to be derived from the words of the statute."

Fidelity Trust Co. vs. Gill Car. Co., 25 Fed., 737.

Also "An act conferring jurisdiction over a certain class of actions upon one court is not repealed by a subsequent act conferring jurisdiction upon another Court." *Gowen vs. Harley*, 56 Fed., 879.

There is no express declaration in the statute under consideration whereby the jurisdiction of the Court is affected, and the only expression from which such an intention might possibly be implied are the words, "And his decision shall be final and conclusive"; we must, therefore, understand what is the meaning of those words, when used as they are here to declare the effect of a statutory enactment.

Our contention is that the words referred to are not equivalent to *exclusive*, and can refer in any event only to such decisions as the Secretary of the Interior may render in any particular case which might come before him; it may mean that such a decision shall be final and conclusive to the exclusion of any further investigation in the courts, of any particular case tried out by the Secretary, but that does not mean that the Court is deprived of jurisdiction to try other cases of a like nature, and certainly it could not be more final and conclusive than the decision of the Courts in similar cases.

“Final” and “Conclusive” mean the same thing.

Hilliard vs. Beattie, 58 N. H., 112.

“A statutory provision that the decision of tax inspectors shall be *final* on a question of assessment only concludes further investigation by the ministerial officers, and does not debar a party, feeling himself aggrieved in the assessment of his property, from the privilege of prosecuting or defending his rights in the Courts.”

McGahee vs. Mathis, 21 Ark., 40.

“And his decision shall be final and conclusive” means that there can be nothing further done in the executive department, and does not mean that there is no resort to Courts of competent jurisdiction.

Manix vs. Hamilton County Commissioners, 43 Ohio St., 210, 1 N. E., 322.

But the question as to whether or not the Court had jurisdiction to reverse a decision of the Secretary in any such case is not now before this Court.

It seems certain and beyond doubt that the jurisdiction of

eases involving the rights of the heirs of Indian allottees is concurrent in the Circuit Courts and the Secretary of the Interior.

We make the further point that the Act of June 26th, 1910, is prospective and applies only to such cases as arise after the approval of the act, and has no application to suits already pending in this Court. This is evident from the use of the word "dies," which by its meaning must refer to allottees who die and not to allottees who have died; "dies" includes all allottees who shall die after the passage of the act, and excludes all allottees who have died prior thereto.

"Expressio unius est exclusio alterius.

The expression of one thing is the exclusion of another."

"As a general rule for the interpretation of statutes, it may be laid down that they never should be allowed a retrospective operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate upon the future only." *Murry vs. Gibson*, 15 How (U. S.) 421, 14 L. Ed., 755, 756.

U. S. Hong vs. U. S., 112 U. S., 536, 28 L. Ed., 770.

6 Am. & Eng. of L., 939 (2nd ed.)

We therefore most respectfully submit to this Court that the acts of Congress of 1894 and 1901, do confer jurisdiction upon the Circuit Courts of the United States of all cases involving controversies as to who the heirs are of Indian allottees, and that the act of June 26th, 1910, does not deprive the Courts of that jurisdiction, but it does confer jurisdiction upon the Secretary of the Interior of cases arising by the death of allottees after the passage of that act, but that such jurisdiction is not exclusive, but is concurrent with the Courts.

The foregoing brief was signed by myself and Winter & Lowell and others and submitted to the lower Court, as friends of the Court and I do not think it possible in the brief time at my disposal to improve upon it, but I will add the further point, statutes which merely give jurisdiction affirmatively to one Court do not oust that already existing in another. Black Constr. and Interpretation of Laws, p. 123.

4th. So far I have treated the subject as though the question of jurisdiction was raised or might have been raised in the Court below in this case, but the record does not show that it was raised at the hearing, but as heretofore shown it was suggested afterwards upon the entry of the decree *nunc pro tunc*. As to the first two points it might have been raised at the final hearing but was not for the obvious reason that all persons concerned considered the question settled; that is, all understood and acquiesced in the conclusion that the Court did have jurisdiction of the so-called heirship cases.

AS TO THE EFFECT OF THE STATUTE OF JUNE 20th, 1910, IT WAS NOT RAISED AND COULD NOT HAVE BEEN RAISED IN THIS CASE AT THE FINAL HEARING OR AT ANY TIME PRIOR TO THAT TIME, OR AT THE TIME OF THE FINAL DECISION OR ANY TIME PRIOR THERETO, for the very potent reason that His Honor, Judge R. S. Bean handed down his decision on the 13th day of June, 1910, (Transcript of Record, p. 14), but the decree by oversight of the Clerk was not entered, and before it was entered the Act of June 20th, 1910, took effect and the question arose then as to whether or not the Court had jurisdiction to enter the decree in this case *nunc pro tunc* as of a day prior to June 20th, 1910, and all agreed that it did have such jurisdiction even though the jurisdiction of the subject matter had been taken away by the Act. That conclusion was arrived at under the general principle.

"*A nunc pro tunc* order is admisable when delay has arisen from the act of the Court." *Brignardello vs. Gray*, 1 Wall., 627, 17 L. Ed., 692.

"*Actus curiae neominem gravibat*," *Mitchell vs. Overman*, 103 U. S. 62. 26 L. Ed., 367, 368, and authorities cited in note.

If the propositions above set out are correct there can be no possible doubt as to the jurisdiction of the Court below and of this Court upon appeal and since the question has been suggested it is important to the executive department and to Indians who claim as heirs that the question shall be determined.

Most respectfully submitted,

R. J. SLATER,

Solicitor for Cross Complainant.

No. 1946

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE COLMAN COMPANY (a Corporation),
Appellant,
vs.

T. W. WITHOFT, Trustee in Bankruptcy of the Estate of
FRANK H. SWEENEY, Bankrupt,
Appellee.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District
Court for the Northern District of California.

FILED
FEB 8 - 1911

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Debtor's Petition.

[Form 1]

To the Honorable J. J. DE HAVEN, Judge of the
District Court of the United States for the
Northern District of California.

The petition of Frank H. Sweeney, resident of and doing business in the County of San Francisco, District and State of California, and by occupation a haberdasher, respectfully represents: That he has resided and been engaged in business for Six months next immediately preceding the filing of this petition, at San Francisco, within said judicial district; that he owes debts which he is unable to pay in full; that he is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law, and desires to obtain the benefit of the Acts of Congress relating to bankruptcy;

That the Schedule hereto annexed, marked "A," and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Acts;

That the Schedule hereto annexed, marked "B," and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said Acts;

Wherefore, your petitioner prays that he may be adjudged by the Court to be a bankrupt within the purview of said Acts.

FRANK H. SWEENEY,
Petitioner.

JAS. P. SWEENEY & JOS. E. BIEN,
Attorney for Petitioner.

Oath to Petition.

United States of America,
Northern District,
State of California,
County of San Francisco,—ss.

I, Frank H. Sweeney, the petitioning debtor mentioned and described in the foregoing petition, hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

FRANK H. SWEENEY,
Petitioner.

Subscribed and sworn to before me this 31 day of March, A. D. 1909.

[Seal] GEORGE PATTISON,
Notary Public in and for the City and County of
San Francisco, State of California.

Filed Mar. 31, 1909, at 40 min, past 2 o'clock P. M.
Jas. P. Brown, Clerk. By John Fouga, Deputy
Clerk.

[Order for Adjudication, Referring Matter to Referee, and Designating Newspaper.]

In the District Court of the United States, Northern District of California.

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

At San Francisco, in said District, on the 1st day of April, 1909, before the said Court in Bankruptcy, the petition of Frank H. Sweeney, that he be adjudged bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said Frank H. Sweeney, is hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to Milton J. Green, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Frank H. Sweeney, shall attend before said referee on the 8th day of April, 1909 at his office in San Francisco, California, at 10 o'clock forenoon, and thenceforth shall submit to such orders as may be made by said referee or by this Court relating to said matter in bankruptcy.

It is further ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Recorder," a newspaper published in the City and County of San Francisco, State of

California, within the territorial district of this Court, and in the County within which said bankrupt resides.

Dated April 1st, 1909.

JOHN J. DE HAVEN,
District Judge.

[Endorsed]: Filed Apr. 1, 1909, at 11 o'clock and 55 minutes A. M. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Affidavit of Colman Co.]

*In the District Court of the United States, for the
Northern District of California.*

In the Matter of FRANK H. SWEENEY,
A Bankrupt.

Claim of Colman Company.

At the City and County of San Francisco, in said District of Northern California, on the 27th day of April, 1909, came Jesse C. Colman, of the City and County of San Francisco, State of California, and made oath and says:

That he is the president and treasurer of Colman Co., a corporation incorporated by and under the laws of the State of California, and doing business in the City and County of San Francisco, State of California, and that as president and treasurer of such corporation he is duly authorized to make this proof, and says that the said Frank H. Sweeney, the person by whom a petition for adjudication in bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to

the said corporation in the sum of \$1375.00, although at the date of the filing of said petition the amount of said debt was not determined; that the consideration of said debt is as follows:

That Frank H. Sweeney and John D. McCarthy were on the 1st day of May, 1906, copartners, doing business in the said City and County of San Francisco under the firm name and style of Sweeney & McCarthy, Inc.; that on the said 1st day of May, 1906, the said copartnership, Sweeney & McCarthy, Inc., and Colman Company did enter into a lease with James S. Webster and N. Bieber, a copy of which lease is hereunto annexed, marked Exhibit "A," and expressly made a part hereof; that subsequently, to wit, in the year 1907, the said John D. McCarthy transferred to the said Frank H. Sweeney all of the interest of him, the said John D. McCarthy, in and to the said copartnership, and the said Frank H. Sweeney thereupon personally assumed all and singular the obligations of said partnership, including the obligation of said lease; that subsequently and prior to February 1st, 1909, the rent provided in said lease was reduced to the sum of \$350 per month;

That on the 28th day of February, 1908, the said Frank H. Sweeney and Colman Co. entered into an agreement, a copy of which is hereunto annexed, marked Exhibit "B," and expressly made a part hereof;

That subsequently, and prior to the 1st day of February, 1909, the said Frank H. Sweeney and said Colman Co. entered into an agreement by the terms

of which it was provided that the Colman Co., by its president, Jesse C. Colman, should negotiate and enter into a contract with James S. Webster and N. Bieber, rescinding said lease, and that as a consideration for the cancellation thereof by James S. Webster and N. Bieber, should agree to pay to said James S. Webster for each and every month of the term provided in said lease remaining after the date of such contract of rescission a sum not to exceed \$100.00; and said contract between Frank H. Sweeney and Colman Co. further provided that said Frank H. Sweeney should pay to said Colman Co. one-half of the amount agreed by Colman Co. to be paid to James S. Webster and N. Bieber as a consideration for the rescission of said contract of lease;

That pursuant to the terms of said lease, said Colman Co. has paid the sum of \$350.00 rent for the month of April, 1909;

That said Colman Co., by its president, Jesse C. Colman, pursuant to the terms of the agreement between Frank H. Sweeney and Colman Co., hereinbefore particularly set forth, has entered into a contract with James S. Webster and N. Bieber, by the terms of which it was provided that the said lease should be cancelled and rescinded, and that the Colman Co. should pay to said N. Bieber the sum of \$1800.00, and to the said James S. Webster the sum of \$600.00, in monthly payments of \$25.00, to commence on the 1st day of May, 1909;

That Colman Co. has on the date hereof paid to the said N. Bieber the said sum of \$1800.00;

That the said Colman Co. has on the date hereof

executed and delivered to the said James S. Webster its obligation to pay the said James S. Webster the sum of \$600.00 in monthly payments of \$25.00, commencing on the 1st day of May, 1909;

That pursuant to the terms of the agreement between Frank H. Sweeney and Colman Co., there is due from Frank H. Sweeney to Colman Co. the sum of \$1200.00;

That no part of said debt of \$1375.00 has been paid; that there are no setoffs or counterclaims to the same or any part thereof;

That said debt was due on the 16th day of April, 1909, although the amount thereof was not then determined, and is evidenced by the exhibits above referred to and by the statement hereto attached, marked Exhibit "C," and made a part hereof;

That said corporation has not, nor has any person by its order, to the knowledge or belief of deponent, for itself, had or received any manner of security of said debt whatsoever; and that no note has been received for such indebtedness, or any part thereof, nor has any judgment been rendered thereon.

COLMAN CO.

By JESSE C. COLMAN,

President and Treasurer.

Subscribed and sworn to before me this 27th day of April, 1909.

[Seal]

O. W. YEARGAIN,

Notary Public in and for the City and County of San Francisco, State of California.

Exhibit "A" [Lease].

THIS LEASE, made the 1st day of May, 1906, between JAMES S. WEBSTER and N. BIEBER as lessors, and the corporation named COLMAN COMPANY and the corporation named SWEENEY and McCARTHY as lessees:

WITNESSETH:

WHEREAS, said James S. Webster is the owner of the premises hereinafter specified and heretofore leased said premises to said N. Bieber, and

WHEREAS, said James S. Webster and said N. Bieber, acting concurrently, each according to his rights, desire to join in executing these presents as a new lease of said premises to the lessees aforesaid upon the terms hereinafter specified;

NOW, THEREFORE, said lessors hereby acknowledge that they have leased and demised and by these presents do lease and demise unto the lessees aforesaid, and said lessees acknowledge that they have hired and taken and by these presents do hire and take of and from said lessors, the following described premises situated in the City and County of San Francisco, in the State of California, viz.:

The certain store contained in the building named SAINT MUNGO BUILDING, situated on the Northwest corner of Golden Gate Avenue and Fillmore Street, in the City and County of San Francisco, State of California, said store being generally known and designated as Numbers 1101 and 1103 Fillmore Street, the same having a floor space of about Twenty-four (24) feet by Forty-seven (47)

feet more or less; for the term of five (5) years from May 1st, 1906, to May 1st, 1911, for the total rent or sum of Twenty-seven thousand Dollars (\$27,000.00) payable in advance in monthly instalments of Four hundred and fifty Dollars (\$450.00) each, on the 1st day of every month, commencing May 1st, 1906, to said lessors as follow, to wit: Two Hundred and Fifty Dollars (\$250.00) of said rental shall be payable monthly as aforesaid to said lessor N. Bieber and Two Hundred Dollars (\$200.00) of said rental shall be payable monthly as aforesaid, to said lessor James S. Webster.

It is mutually agreed that the above letting and taking is upon the following terms and conditions:

1st. That the premises hereby leased are to be used and occupied by the lessee for use as a store or stores for the sale of Mens' and Boys' Clothing, Furnishing Goods, Hats and Mens' Shoes, and for other *purpose* except those prohibited by paragraph 11 of this lease, without the written consent of the lessor; that the lessee shall not sublet the said premises, nor assign this lease nor any rights thereunder without the written consent of the lessor except as hereinafter specified, and that no goods or merchandise shall be kept, stored or sold in said premises which are in any way hazardous or which will increase the present rate of insurance upon the building in which said demised premises are situated.

2nd. That the premises are now in a tenantable and good condition and that they shall be kept in good condition by and at the expense of the lessees during this lease; that they shall not be altered or

repaired without the written consent of the lessors, and that, unless otherwise provided by written agreement, all alterations, repairs and improvements that may be required by the lessees shall be done only by the written consent of the lessors, first had and obtained, but at the cost of the lessees; that all such alterations, repairs, additions or improvements (except trade fixtures, counters, shelving and movable partitions placed therein by the lessees for the requirements of their business), shall, unless otherwise provided by written agreement, be the property of the lessor James S. Webster, and shall remain upon and be surrendered with the premises upon the expiration of this lease; that all damage or injury done to the premises hereby leased, or to said Saint Mungo Building or to any property therein, by the lessees or by any person who may be in or upon the demised premises with the consent of the lessees from any cause whatsoever (damage by the elements excepted) shall be paid for by the lessees on demand; the lessees and every person claiming under them hereby waive all claims against the lessor for damages to the fixtures, goods and effects of every kind, contained in said demised premises, from any cause whatsoever; and agree that the lessees and all persons acting at their instance, permission, sufferance or neglect, shall at the termination of this lease surrender the demised premises to the lessor James S. Webster in as good condition as reasonable and proper use thereof will permit.

3rd. That the lessees agree to replace at their expense at any time during the existence of this lease,

or upon its termination, any and all window and skylight glasses, or gas or electric light globes, owned by the lessors in said demised premises, that may be broken during their occupancy of said premises, and the said lessees hereby acknowledge that all of the skylight glasses, gas and electric light globes now in said demised premises, owned by the lessor, are in good condition at the commencement of this lease.

4th. That all bills for water, gas and electricity furnished to said demised premises shall be paid by the lessees.

5th. That no signs nor placards shall be placed upon the exterior of the building nor upon the stairs, nor in the hallways or vestibules in which the herein demised premises are situated nor upon the entrance doors, windows or vestibules of the premises herein leased without the written consent of the lessor first had and obtained, except only that said lessees may affix to the premises hereby leased and maintain over the sidewalk adjoining the same, such proper electric signs as may be unobjectionable in character and permitted by the public authorities, and the customary window-signs.

6th. That if the building on the above-described premises shall be destroyed by fire or other cause, or be so damaged thereby as to be untenable and it cannot be rendered tenantable within thirty days from the day of the injury, this lease shall be deemed terminated by such destruction or damage of said premises; but that in case the premises are so damaged as not to require a termination of the lease as above provided, the lessor James S. Webster agrees

to restore the same at his expense within thirty days from the injury, (unless prevented by strikes or other cause beyond the control of the lessor) and the lessees shall not pay the rent herein specified during the term that the premises are being restored; but shall upon the restoration thereof pay the rent from the date of said restoration at the same monthly rent as above provided.

7th. That in case the lessors prevail in any suit brought against the said lessees or any person or persons claiming under them or at their instance, permission, sufferance or neglect for the violation of any of the covenants of this lease or for the recovery of possession of said demised premises, the lessees shall on demand pay to the lessors for the fees of their attorney in such suit the sum of \$100.00; and said amount shall be taxed as a part of the costs of such suit.

8th. That the lessor and his representatives shall have the right which is hereby granted to enter the herein demised premises at any time during the term of this lease to ascertain the condition of the premises and for any other purposes incidental to the rights of the lessors; and it is further agreed that the lessees shall permit the lessors or their agent to enter upon and show the premises to persons wishing to rent or lease the same and allow the usual notice "To Let" or "To Lease" to be placed upon the premises for 30 days next preceding the expiration of this lease and permit such notice to remain thereon without hindrance or molestation on the part of the lessees or anyone in their employ, for said thirty days.

9th. That the said lessees agree that in the event of the inability of the lessors to deliver possession of said demised premises at the time herein agreed, then the lessors shall not be liable for any damages thereby nor shall this lease be void or voidable, but in such event the lessees shall not be liable for any rent until such time as the said lessors can deliver possession of the herein demised premises.

10th. That in case the said lessees shall hold over the said premises beyond the term herein provided, without the written consent of the lessors such holding over shall be deemed merely a tenancy from month to month, and at the monthly rental of Nine Hundred Dollars (\$900.00) payable monthly in advance on the first day of each month.

11th. Said lessees shall have permission to sublet said premises for part or all of the term hereinabove specified but only to tenants who shall and will use the same for the purposes of a general merchandise business but not for the purposes of a bakery, butcher-shop, saloon, restaurant, wine or liquor establishment, or place where cooking is done or objectionable operations conducted, nor for any business unauthorized by law or that is of the same general character as that conducted by any other tenant in said SAINT MUNGO BUILDING. If said lessees shall sublet all or part of the premises hereby leased contrary to this provision, or if said lessees or any subtenant or other person acting at their instance or by their permission, consent, sufferance or neglect, shall use part or all of the premises hereby leased contrary to this provision, then and

thereupon this lease shall forthwith be concluded and stand terminated at the option of said lessors.

That the words "lessors" and "lessees" as herein used, include, apply to, and bind and benefit the heirs, executors, administrators, successors and assigns of the lessors and lessees.

In witness whereof, the lessors and lessees have hereunto set their hands in duplicate the day and year first above written.

JAMES S. WEBSTER,
N. BIEBER,
COLEMAN CO.,

Per JESSE C. COLEMAN,

Pres.

SWEENEY & McCARTHY, Inc.
By FRANK H. SWEENEY,

Pres.

Exhibit "B" [Agreement—Sweeney—Colman Co].

THIAS AGREEMENT, made at the City and County of San Francisco, State of California, the 28th day of February, 1908, by and between FRANK H. SWEENEY, of said City and County and State, the party of the first part, and COLMAN COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, the party of the second part,

WITNESSETH:

That whereas on the first day of May, 1906, said Colman Company and Sweeney & McCarthy did lease from James S. Webster and N. Bieber, a certain store situate in San Francisco in the building

named "St. Mungo," situate on the northwest corner of Golden Gate Avenue and Fillmore Street, designated and known as #1101-1103 Fillmore Street, for the term of five (5) years from May 1, 1906, at a monthly rental of four hundred and fifty (\$450) dollars per month; and whereas said Frank H. Sweeney is and at the time of the execution of said lease was a stockholder of said Sweeney & McCarthy; and whereas the rent in said lease provided to be paid is to be paid jointly by the lessees in said lease named; and whereas, further, it is desirable that each of the parties lessee in and to said lease should hold the other free and harmless from any and all liability in excess of its one-half share of said rent therein reserved, or of the amount to which said rent may be reduced in the future; and whereas said Frank H. Sweeney desires an agreement looking to that end to be made by said Colman Company with him instead with said Sweeney & McCarthy, and said Colman Company desires said agreement to be made with it by said Frank H. Sweeney instead of by said Sweeney & McCarthy,

NOW, THEREFORE, it is agreed by and between said parties as follows, to wit:

The said Colman Company does undertake and agree with the said Frank H. Sweeney that it will hold the said Sweeney & McCarthy free and harmless from any and all liability upon the rent in said lease reserved, or the amount to which it may be reduced in excess of one-half of said rent or said amount to which it may be reduced, and the said Frank H. Sweeney in turn does undertake and agree to hold

the said Colman Company free and harmless from any and all liability upon the rent in said lease reserved or the amount to which it may be reduced in excess of one-half of said rent, or said amount to which it may be reduced. And said parties hereto agree and undertake, one with the other, as surety to the other against any liability or obligation on said rent so reserved in said lease, or the amount thereof to which it may be reduced, in excess of one-half thereof.

IN WITNESS WHEREOF, the said Colman Company has caused these presents to be subscribed and its corporate name and seal to be hereunto affixed by its President and Secretary thereunto duly authorized, and the said Frank H. Sweeney has hereunto set his hand the day and year first above written.

IN DUPLICATE.

COLMAN COMPANY.

By JESSE C. COLMAN,

President.

By CLARENCE COLMAN,

Secretary.

FRANK H. SWEENEY.

Exhibit "C" [Account].

FRANK H. SWEENEY, To Colman Co. Dr.

April 1, 1909, 1/2 rent of \$350 for store 1105

Fillmore St.....\$175.00

April 27, 1909, 1/2 of \$1800 (the amount paid

to N. Bieber by Colman Co. pursuant to agreement with Frank H.

Sweeney) 900.00

April 27, 1909, 1/2 of \$600.00 (the amount of

obligation of Colman Co. to James S.

Webster pursuant to same agreement).. 300.00

Total \$1375.00

[Endorsed]: Filed 27th day of Apl., 1909, at 1:20 o'clock P. M. M. J. Green, Referee in Bankruptcy, in and for the City and County of San Francisco.

[Trustee's Petition to District Court for Review.]

In the District Court of the United States, for the Northern District of California.

IN BANKRUPTCY—No. 6100.

In the Matter of FRANK H. SWEENEY,

A Bankrupt.

PETITION FOR REVIEW OF ORDER OF REFEREE ALLOWING CLAIM OF COLMAN COMPANY AGAINST THE ESTATE OF SAID BANKRUPT.

To the Honorable District Court of the United States, for the Northern District of California:
Your petitioner, T. W. Withoft, as Trustee in

Bankruptcy of the Estate of said Frank H. Sweeney, represents to the above-named Honorable Court as follows:

Heretofore, on, to wit: the 31st day of March, 1909, said Frank H. Sweeney filed his petition in the above-entitled court, to be adjudged a bankrupt, and thereafter, on, to wit: the 1st day of April, 1909, by an order duly given and made by the said District Court of the United States for the Northern District of California, said Frank H. Sweeney was adjudged a bankrupt, and your petitioner is the duly appointed, qualified and acting Trustee in Bankruptcy of the estate of said bankrupt.

Thereafter, on the 27th day of April, 1909, the Colman Company, a corporation, filed its verified Proof of Claim against the estate of said bankrupt with the Honorable Milton J. Green, Referee in Bankruptcy.

Your petitioner, as the Trustee in Bankruptcy of the estate of said bankrupt, resisted and opposed the allowance of said claim, for the reasons that said claim of said Colman Company did not constitute a provable claim in bankruptcy against the estate of said bankrupt, and that said claim of said Colman Company did not fall within any of the provisions of the Bankrupt Act relating to provable claims, and that the same should, therefore, be expunged and disallowed.

The facts as disclosed by said Proof of Claim of said Colman Company filed with said Referee as aforesaid, and as admitted in the briefs filed in said proceedings, and as conceded on the argument of said

question by the respective counsel before the Honorable Referee, are as follows, to wit:

On the 1st day of May, 1906, said Frank H. Sweeney, the above-named bankrupt, and one McCarthy were co-partners doing business under the firm name and style of Sweeney & McCarthy, Inc., at the City and County of San Francisco, in the State of California.

On said 1st day of May, 1906, said partnership and claimant, Colman Company, as lessees, entered into a contract of lease with James S. Webster and N. Bieber, as lessors, wherein said lessees rented from said lessors a certain store known as Nos. 1101 and 1103 Fillmore Street, in the City and County of San Francisco, State of California, for the term of five years from the 1st day of May, 1906, to the first day of May, 1911, for a total rental of \$2700.00, payable in advance in monthly installments of \$450.00 each on the 1st day of every month, commencing May 1, 1906. Under the terms of said lease the monthly installments of rent therein reserved were made payable to the respective lessors by said lessees, in the following proportions, to wit: \$250.00 to said N. Bieber, and \$200.00 to said James S. Webster.

Subsequently to the execution of said lease, and in the year 1907, said McCarthy, the partner of said Frank H. Sweeney, sold out all his interest in said partnership to said Frank H. Sweeney, and said Frank H. Sweeney assumed all the liabilities of said partnership, including that of said lease.

On the 28th day of February, 1908, an agreement was made and entered into by and between Frank H.

Sweeney and the Colman Company, wherein and whereby each party agreed to hold the other harmless from any and all liability upon the rent reserved in said lease, or of any amount to which said rent might be reduced in excess of one-half of said rent, or of any amount to which the same might be reduced; all as more particularly appears by reference to Exhibit "B," attached to the Proof of Claim of the Colman Company on file herein, to which reference is hereby made.

On the 1st day of February, 1909, the monthly installments of rent were reduced from \$450.00 to \$350.00.

Subsequently to the 28th day of February, 1908, and prior to the 1st day of February, 1909, said Frank H. Sweeney and claimant entered into an agreement whereby the Colman Company, by its president, should negotiate and enter into a contract with the said lessors of the said lease for the rescission of said lease, and under and by virtue of said contract the Colman Company was empowered to pay for each and every month of the term provided in said lease remaining after the date of the rescission thereof, in consideration of said lease being rescinded, a sum not to exceed \$100.00. Said contract further provided that, in consideration of said Colman Company bringing about a rescission of said lease upon the terms in said contract agreed upon, said Sweeney should pay to said Colman Company one-half of the amount agreed to be paid by said Colman Company to said lessors, providing that said rescission was brought about upon the basis of said

Colman Company paying to said lessors, as a consideration for the rescission of said lease, a sum not to exceed \$100.00 per month for each and every month of the term reserved in said lease remaining after the date of the rescission thereof.

Shortly after the adjudication in bankruptcy of said Frank H. Sweeney, a rescission of the said lease was brought about upon the consideration of said Colman Company paying to said Bieber, one of the lessors of said lease, the sum of \$1800.00 cash, and to said Webster, the other of the lessors of said lease, the sum of \$600.00 in monthly payments of \$25.00, to commence on the 1st day of May, 1909.

On the 27th day of April, 1909, said Colman Company, in pursuance of said agreement of rescission, paid to said Bieber the sum of \$1800.00, and on the same date executed to said Webster its obligation to pay \$600.00 in monthly installments of \$25.00 each, commencing May 1, 1909.

On the 1st day of April, 1909, said Colman Company paid to said lessors the installment of rent for the month of April, 1909, amounting to the sum of \$350.00.

The following statements appear in the Proof of Claim presented and filed by said Colman Company as aforesaid, to wit:

“that the said Frank H. Sweeney, the person by whom a petition for an adjudication in bankruptcy has been filed, was at the date of the filing of the said petition, and still is, justly and truly indebted to said corporation (Colman Company) in the sum of \$1375.00, although at the

date of the filing of said petition the amount of said debt was not determined''; (Page 1, Proof of Claim.)

Again,

“That said debt was due on the 16th day of April, 1909, although the amount thereof was not then determined, and is evidenced by the exhibits above referred to, and by the statement hereto attached, marked Exhibit ‘C’ and made a part hereof.”

On the 20th day of July, 1910, the opposition of this petitioner to the allowance of said claim of the Colman Company came on for hearing before the Honorable Milton J. Green, Referee in Bankruptcy, and on said day said Referee duly gave and made an order in said proceeding, allowing the said claim of said Colman Company as a provable debt and claim against the estate of said Frank H. Sweeney.

Your petitioner has duly excepted to said order, and to the whole thereof.

The said Milton J. Green, as Referee in Bankruptcy, in making his said order as aforesaid, erred in the following particulars, to wit:

First. That said Referee erred in that he allowed the claim of said Colman Company against the estate of the above-named bankrupt.

Secondly. That said Referee erred in that he did not disallow said claim.

Thirdly. That said Referee erred in adjudging that said claim was a debt within section 63-a of the Bankruptcy Act, provable against the estate of said bankrupt.

Fourthly. That said Referee erred in not adjudging that said claim was not a debt within section 63-a of the Bankruptcy Act, and not provable against the estate of said bankrupt.

Fifthly. That said Referee erred in not adjudging that said claim was a contingent liability at the time of the filing of said petition in Bankruptcy, and not provable in bankruptcy against the estate of said bankrupt.

Sixthly. That said Referee erred in not adjudging that said claim was not a fixed liability owing at the time of the filing of the petition of said bankrupt, and not provable against the estate of said bankrupt.

Seventhly. That said Referee erred in adjudging that that part of the said claim arising by reason of the payment of the April installment of rent by the Colman Company was a provable debt in bankruptcy against the estate of said bankrupt.

Eighthly. That said Referee erred in not adjudging that that part of the said claim arising by reason of the payment by said Colman Company of the April installment of rent was a contingent liability at the time of the filing of the Petition in Bankruptcy of said bankrupt, and not provable against the estate of said bankrupt.

Ninthly. That said Referee erred in not adjudging that that part of said claim arising out of the payment of the April installment of rent by the Colman Company was not a fixed liability owing at the time of the filing of the Petition in Bankruptcy, and not provable against the estate of said bankrupt.

Tenthly. That said Referee erred in adjudging

that that portion of said claim arising out of the contract relating to the rescission of said lease was a provable debt in bankruptcy against the estate of said bankrupt.

Eleventhly. That said Referee erred in not adjudging that that portion of said claim arising out of said contract relating to the rescission of said lease was a contingent liability at the time of the filing of the Petition in Bankruptcy of said bankrupt, and not provable in bankruptcy against his said estate.

Twelfthly. That said Referee erred in not adjudging that that portion of said claim arising out of the contract relating to the rescission of said lease was not a fixed liability absolutely owing at the time of the filing of said Petition in Bankruptcy, and was not provable against the estate of said Bankrupt.

Wherefore, your petitioner prays that the referee certify the record up to said Court for review, and that said Court review the order of said referee allowing the claim of said Colman Company against the estate of said bankrupt; that said Court reverse the order of said Referee allowing said claim against the estate of said bankrupt, and that it direct the Referee to expunge and disallow said claim; and

that this Court make such further order as is meet in the premises.

Dated this 25th day of July, 1910.

T. W. WITHOFT,

Petitioner and Trustee in Bankruptcy of the Estate of said Frank H. Sweeney.

J. M. & H. L. ROTHCHILD,

ROTHCHILD, GOLDEN & ROTHCHILD,

JOSEPH KIRK,

Attorneys for Said Petitioner and Trustee in Bankruptcy.

State of California,

City and County of San Francisco,—ss.

T. W. Withoft, Trustee of the estate and effects of Frank H. Sweeney, a bankrupt, the petitioner mentioned and described in the foregoing petition for review of Order of Referee, does hereby make solemn oath that the statements of fact contained in said petition are true to the best of his knowledge and belief.

T. W. WITHOFT.

Subscribed and sworn to before me this 25th day of July, 1910.

[Notarial Seal]

OLIVER DIBBLE,

Notary Public in and for the City and County of San Francisco, State of California.

Service by receipt of copy of *with* Petition Admitted this 25th July, 1910.

J. C. MEYERSTEIN,

F.

Attorney Colman Company.

[Endorsed]: Filed July 25, 1910. 10 A. M. M. J. Green, Referee.

*In the District Court of the United States, for the
Northern District of California.*

IN BANKRUPTCY—No. 6100.

In the Matter of FRANK H. SWEENEY,
A Bankrupt.

Stipulation [Re Facts].

For the purpose of having the order of Hon. Milton J. Green, Referee in Bankruptcy, made on the 20th day of July, 1910, in the above-entitled proceeding, allowing the claim of the Colman Company against the estate of the above-named bankrupt, reviewed by the above-entitled Court, IT IS HEREBY STIPULATED as follows:

1. For such purpose, that said Court may consider the facts as set forth in the Petition for Review heretofore filed with said Referee to be true.

2. For such purpose, that said Court may consider the facts set forth in the Proof of Claim of said Colman Company heretofore filed with said Referee to be true, excepting that said Trustee does not stipulate that there was any indebtedness due from said bankrupt to said claimant at the time of the filing of the Petition in Bankruptcy, or at any other time, or that the sum of \$1375.00, the amount of said claim or any other sum, was due or owing from said bankrupt to said claimant, at the time of filing said Petition in Bankruptcy, or at any other time; and with this reservation said Trustee in Bankruptcy stipu-

lates that the facts contained in said Proof of Claim are true.

Dated this 2d day of August, 1910.

J. C. MEYERSTEIN,

Attorney for Claimant.

J. M. & H. L. ROTHCHILD,

Attorneys for Trustee.

[Endorsed]: Filed 3 day of Aug., 1910, at 11 o'clock A. M. M. J. Green, Referee in Bankruptcy, in and for the City and County of San Francisco.

[Report of Referee in Bankruptcy.]

*In District Court of the United States, Northern
District of California.*

IN BANKRUPTCY—No. 6100.

In the Matter of FRANK H. SWEENEY,

Bankrupt,

To the Honorable the Judges of the District Court
of the United States, Northern District of Cali-
fornia:

I, Milton J. Green, referee in bankruptcy of the
above-entitled court, do hereby certify:

That in the course of the proceedings in said cause
before me the following question arose pertinent to
said proceedings;

A proof of debt was presented against said bank-
rupt by Colman Company in the sum of \$1,375,
which proof of debt is herewith transmitted. Ob-
jections were made by the trustee to the allowance
of said claim, and a hearing was had thereon. The
evidence relating thereto is shown by petition for re-

view herewith transmitted. The matter was argued by the respective attorneys for said Colman Company and the trustee, and on the 20th day of July, 1910, the said objections were overruled by me, and it was ordered that said claim be allowed in the amount proven, to wit: \$1,375.

On the 25th day of July, 1910, said trustee filed his petition for review of said order, and said question is hereby certified to the judges for their opinion thereon.

Dated this 11th day of August, 1910.

MILTON J. GREEN,
Referee in Bankruptcy.

[Endorsed]: Filed Aug. 15, 1910, at 3 o'clock and — min. P. M. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Order Reversing Order of Referee, etc.]

At a stated term of the District Court of the United States of America, in and for the Northern District of California, held at the Courtroom thereof in the City and County of San Francisco, on Monday, the 5th day of December, in the year of our Lord One Thousand Nine Hundred and Ten. Present, The Honorable R. S. BEAN, Judge.

No. 6100.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

The petition for review of the order of the referee made herein on July 20, 1910, allowing the claim of The Colman Company, having been heretofore sub-

mitted to the Court for decision, now after due consideration had thereon, by the Court ordered that said order be and the same is hereby reversed and the exceptions to said order sustained.

[Petition for Appeal.]

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,

Bankrupt,

Colman Company, a corporation, and a creditor of the above-entitled bankrupt, conceiving itself aggrieved by the order given and made by the above-entitled court on the 5th day of December, 1910, in the above-entitled proceeding, sustained the exceptions of T. W. Withoft, trustee of the estate of the above-named bankrupt, to the order of the Referee in Bankruptcy theretofore made allowing the claim of said Colman Company, a corporation, filed in the above-entitled proceeding, which said order disallows and rejects the claim of said Colman Company, a corporation, does hereby appeal from said order to the Circuit Court of Appeals of the United States for the Ninth Circuit, and prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Circuit

Court of Appeals of the United States for the Ninth Circuit.

JOSEPH C. MEYERSTEIN,
Attorney for Colman Company, a Corporation, Appellant.

Due service of the within Notice of Appeal, by receipt of a true copy thereof, is hereby acknowledged at the City and County of San Francisco, State of California, in said District, this 15th day of December, A. D. 1910.

ROTHCHILD, GOLDEN & ROTHCHILD, and
JOSEPH KIRK,
Attorneys for T. W. Withoft, Trustee of the Estate
of Frank H. Sweeney, Bankrupt.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock
and — min. P. M. Jas. P. Brown, Clerk. By Francis
Krull, Deputy Clerk.

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

Assignment of Errors.

The Colman Company, a corporation, appellant in the above-entitled matter in connection with its appeal from the order of the District Court of the United States for the Northern District of California, entered on the 5th day of December, 1910, in the above-entitled proceeding, disallowing and rejecting the claim of the Colman Company, a corporation,

theretofore filed in said proceeding, makes the following assignment of errors upon which said appellant will rely in the Circuit Court of Appeals of the United States for the Ninth Circuit, for relief from the said order made and entered in said matter as aforesaid on the 5th day of December, 1910, to wit:

I.

The Court erred in sustaining the exceptions of T. W. Withoft, trustee of the estate of Frank H. Sweeney, bankrupt, to the order of the Referee allowing the claim of said Colman Company, a corporation, in said proceeding.

II.

The Court erred in not overruling the exceptions of said T. W. Withoft, trustee of the estate of Frank H. Sweeney, to the order of the Referee allowing said claim of said Colman Company, a corporation, as filed in said proceeding.

III.

The Court erred in adjudging that the said claim of Colman Company, a corporation, as filed in said proceeding, was not a provable claim against the estate of Frank H. Sweeney, bankrupt.

IV.

The Court erred in not adjudging that the claim of Colman Company, a corporation, as filed in said proceeding, was a provable claim against the estate of Frank H. Sweeney, bankrupt.

V.

The Court erred in disallowing and rejecting the claim of Colman Company, a corporation, as filed in said proceeding.

VI.

The Court erred in not adjudging that the claim of Colman Company, a corporation, as filed in said proceeding, was entitled to allowance under the provisions of Section 63, paragraph A, subdivision IV, of the Acts of Congress Relating to Bankruptcy.

Dated this 14th day of December, A. D. 1910.

JOSEPH C. MEYERSTEIN,

Attorney for Colman Company, a Corporation, Appellant.

Due service of the within Assignment of Errors, by receipt of a true copy thereof, is hereby acknowledged at the City and County of San Francisco, State of California, in said District, this 15th day of December, A. D. 1910.

ROTHCHILD, GOLDEN & ROTHCHILD, and
JOSEPH KIRK,

Attorneys for T. W. Withoft, Trustee of the Estate of Frank H. Sweeney, Bankrupt.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock and — min. P. M. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,

Bankrupt.

Order Allowing Appeal, etc.

Now at this day, the application of Colman Company, a corporation, for the allowance of an appeal

from an order given and made by the above-entitled Court on the 5th day of December, 1910, disallowing and rejecting the claim of said Colman Company, a corporation, as filed in said proceeding, having been duly presented:

IT IS ORDERED that said appeal be, and the same is hereby allowed, and that a citation issue and be served as by law provided, upon the filing of a bond by the said Colman Company, a corporation, in the sum of Five Hundred Dollars, with good and sufficient sureties to be approved by the Court or a Judge thereof.

R. S. BEAN,

Judge of the United States District Court.

Due service of the within Order Allowing Appeal, by receipt of a true copy thereof, is hereby acknowledged at the City and County of San Francisco, State of California, in said District, this 15th day of December, A. D. 1910.

ROTHCHILD, GOLDEN & ROTHCHILD, and
JOSEPH KIRK,

Attorneys for T. W. Withoft, Trustee of the Estate
of Frank H. Sweeney, Bankrupt.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock P. M.
Jas. P. Brown, Clerk. By Francis Krull, Deputy
Clerk.

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt,

Bond on Appeal.

Know All Men by These Presents, that we, Colman Company, a corporation organized under the laws of the State of California, and appellant herein, as principal, and National Surety Company, a corporation organized under the laws of the State of New York, and duly authorized to act as a surety upon this bond, as surety, are held and firmly bound unto T. W. Withoft, trustee of the estate of Frank H. Sweeney, Bankrupt, in the sum of Five Hundred Dollars (\$500.00), to be paid to said T. W. Withoft as such Trustee, his successors or assigns, for which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated the 14th day of December, A. D. 1910.

WHEREAS the above-named Colman Company, a corporation, has appealed to the Circuit Court of Appeals of the United States for the Ninth Circuit, from an order given, made and entered by the District Court of the United States for the Northern District of California, disallowing and rejecting the claim of said Colman Company, a corporation, as filed in the above-entitled proceeding, and an order

has been duly given and made by said District Court allowing said appeal and directing a citation to issue as required by law;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Colman Company, a corporation, appellant, shall prosecute said appeal to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

COLMAN CO.

By JESSE C. COLMAN,
President.

NATIONAL SURETY COMPANY,
By FRANK L. GILBERT,
Resident Vice-President.

[Seal] Attest: C. E. OBERG,
Resident Asst. Secretary.

The within bond and surety are hereby approved this 15th day of Dec., A. D. 1910.

R. S. BEAN,
Judge of the District Court of the United States.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock P. M.
Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

[Citation on Appeal (Copy).]

*In the District Court of the United States in and for
the Northern District of California.*

No. 6100—IN BANKRUPTCY.

In the Matter of FRANK H. SWEENEY,
Bankrupt.

United States of America,
Northern District of California,—ss.

To T. W. Withoft, Trustee of the Estate of Frank H.
Sweeney, Bankrupt, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City and County of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Northern District of California, wherein Colman Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the judgment so appealed from should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at San Francisco, in the Northern District of California, this 15th day of December, A. D. 1910.

R. S. BEAN,

Judge of the United States District Court.

Due service of the within Citation, by receipt of a true copy thereof, is hereby acknowledged at the

City and County of San Francisco, State of California, in said District, this 15th day of December, A. D. 1910.

ROTHCHILD, GOLDEN & ROTHCHILD, and
JOSEPH KIRK,

Attorneys for T. W. Withoft, Trustee of the Estate
of Frank H. Sweeney, Bankrupt.

[Endorsed]: Filed Dec. 15, 1910, at 2 o'clock and
— min. P. M. Jas. P. Brown, Clerk. By Francis
Krull, Deputy Clerk.

[Certificate of Clerk U. S. District Court to Record.]

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify the foregoing and hereunto annexed thirty-one pages to contain full, true and correct copies of the Petition for Adjudication (without accompanying schedules), Order of Adjudication, Order of Court reversing Order of Referee, Notice of Appeal, Order Allowing Appeal, Bond on Appeal, Assignment of Errors and Citation, now on file in this office, together with a true and correct copy of the following documents originally filed with the United States Referee in Bankruptcy, in and for the City and County of San Francisco, and by said Referee duly transmitted to this Court, with the Referee's Certificate, viz.: Claim of Colman Company, Referee's Report on Said Claim, Petition for Review of Order of Referee, Stipulation on Petition for Review, in the case of Frank H. Sweeney, No. 6100, in Bankruptcy, and which now remain on file and of record in this office.

In witness whereof, I have hereunto set my hand, and affixed the Seal of said District Court, at San Francisco, in said District, this 12th day of January, A. D. 1911.

[Seal]

JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1946. United States Circuit Court of Appeals for the Ninth Circuit. The Colman Company (a Corporation), Appellant, vs. T. W. Withoft, Trustee in Bankruptcy of the Estate of Frank H. Sweeney, Bankrupt, Appellee. In the Matter of Frank H. Sweeney, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California.

Filed January 20, 1911.

F. D. MONCKTON,
Clerk.

No. 1946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLMAN COMPANY (a corporation),
Appellant,

VS.

T. W. WITHOFT, Trustee in Bankruptcy
of the Estate of FRANK H. SWEENEY,
Bankrupt,
Appellee.

In the Matter of

FRANK H. SWEENEY,
Bankrupt.

BRIEF FOR APPELLANT.

JOSEPH C. MEYERSTEIN,
Attorney for Appellant.

Filed this.....day of April, 1911.

FRANK D. MONCKTON, Clerk.

By.....**FILED**.....Deputy Clerk.

APR 20 1911

No. 1946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLMAN COMPANY (a corporation),
Appellant,

VS.

T. W. WITHOFT, Trustee in Bankruptcy
of the Estate of FRANK H. SWEENEY,
Bankrupt,
Appellee.

In the Matter of
FRANK H. SWEENEY,
Bankrupt.

BRIEF FOR APPELLANT.

Statement of Facts.

The voluntary petition of Frank H. Sweeney in this matter was filed on the 31st day of March, 1909, and the order of adjudication was made on the 1st day of April, 1909. The Colman Company and the bankrupt were liable together on a certain lease, the term of which at the date of the filing of the petition and of adjudication had not yet expired. On the

18th day of February, 1908, the Colman Company and the bankrupt entered into an agreement, the purpose of which was to impose upon each of the parties thereto a several liability as to one-half of the rental reserved in the lease. In other words, as between themselves, the Colman Company and the bankrupt agreed that each should be liable for one-half of the rent reserved, and no more. The agreement further recited: "And said parties hereto
" agree and undertake, one with the other as surety
" to the other against any liability or obligation for
" any rent so reserved in said lease or the amount
" thereof to which it may be reduced in excess of
" one-half thereof."

Prior to the 1st day of February, 1909, and before the filing of the petition, the bankrupt and the Colman Company entered into a second agreement, by the terms of which it was provided that the Colman Company should enter into a contract with the lessors for the rescission of the lease, and the Colman Company was further empowered to pay for each and every month of the term provided in said lease remaining after the date of the rescission a sum not to exceed \$100. The agreement further provided that the bankrupt should pay to the Colman Company one-half of the amount paid by the Colman Company, or agreed to be paid by it, as a consideration for the rescission of the lease. The Colman Company paid the rent for the month of April, amounting to \$350, and shortly after the date of adjudication made an agreement with the lessors

whereby in consideration of the payment of \$2400 the lease was canceled.

Under the terms of the agreement last referred to there thereupon became due from the bankrupt to the Colman Company one-half of this amount, or \$1200. Adding to this sum one-half of the April rent paid by the Colman Company, we have a total of \$1375; for which a claim was filed in proper form by the Colman Company. (Tr. pp. 4-17.) This claim was objected to by the Trustee in Bankruptcy, and after a full hearing and argument the objections were overruled, and the claim was allowed by the Referee in Bankruptcy. (Tr. p. 28.) The Trustee filed a petition for review of the order of the Referee allowing the claim, and the matter was thereupon heard on the certificate of the Referee and a stipulation as to the facts, by the District Court of the United States for the Northern District of California, and after hearing, the exceptions to the ruling of the Referee were sustained by the District Court and the claim disallowed. (Tr. p. 28.) From this order of the District Court made on the 5th day of December, 1910, appellant prosecutes this appeal.

Assignment of Errors.

1. The Court erred in sustaining the exceptions of T. W. Withoft, trustee of the estate of Frank H. Sweeney, bankrupt, to the order of the Referee al-

lowing the claim of said Colman Company, a corporation, in said proceeding.

2. The Court erred in not overruling the exceptions of said T. W. Withoft, trustee of the estate of Frank H. Sweeney, to the order of the Referee allowing said claim of said Colman Company, a corporation, as filed in said proceeding.

3. The Court erred in adjudging that the said claim of Colman Company, a corporation, as filed in said proceeding, was not a provable claim against the estate of Frank H. Sweeney, bankrupt.

4. The Court erred in not adjudging that the claim of Colman Company, a corporation, as filed in said proceeding, was a provable claim against the estate of Frank H. Sweeney, bankrupt.

5. The Court erred in disallowing and rejecting the claim of Colman Company, a corporation, as filed in said proceeding.

6. The Court erred in not adjudging that the claim of Colman Company, a corporation, as filed in said proceeding, was entitled to allowance under the provisions of Section 63, paragraph A, subdivision IV, of the Acts of Congress Relating to Bankruptcy.

Argument.

Practically, the question for determination here may be stated to be whether the claim of the Colman Company as filed is a provable claim under the pro-

visions of Section 63 of the Bankruptcy Act. The full text of that section is as follows:

“DEBTS WHICH MAY BE PROVED. a. Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract, express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

“(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.”

In the Court below the Trustee based his position on the line of cases holding that claims for future rents, or claims of a contingent nature, are not provable. Typical of this line of cases are *Watson v.*

Merrill, 14 A. B. R. 453, and the later case of *Re Roth & Appel*, 24 A. B. R. 588. These cases all go off on the proposition that a claim of the character of that under consideration in the cases just cited, is not a "fixed liability absolutely owing at the time of the filing of the petition". An examination of the cases shows that they all ignore the fact that Subdivision 4 of Section 63a is co-ordinate with Subdivision 1 of the same section, and hence not controlled or limited by it. If this were otherwise, Subdivisions 2, 3 and 5 would be limited by Subdivision 1 as well as Subdivision 4. No such contention has ever been advanced, nor could it well be. For instance, Subdivision 2 provides for the proving of a claim

"due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice".

How can the language of Subdivision 1 be read into Subdivision 2? In the very nature of things a claim arising under Subdivision 2 could not be a fixed liability absolutely owing at the time of the filing of the petition, for the reason that a claim under Subdivision 2 cannot arise until after the election of a trustee and until after a trustee has declined to prosecute an action passing to him after notice. Furthermore, there is no more reason for holding that the words "fixed liability absolutely owing at the time of the filing of the petition"

should be interpolated in Subdivision 4 than that any other language in Subdivision 1 should be, as, for instance, “as evidenced by an instrument in writing”. The absurdity of such a contention is apparent; yet it is just as logical as the reasoning which influences and governs the so-called rent cases.

There would be no difficulty in arriving at a decision in the case at bar if the same recognition were accorded to Subdivision 4 as is accorded to Subdivision 1, for it then becomes plain that *all* claims which are debts founded upon a contract, whether they be fixed liabilities at the time of the filing of the petition or not, are provable. The only limitation which with reason can be put upon the language of Subdivision 4 is that which would exclude a contingent claim where the contingency is of such a nature as to make it absolutely impossible to determine the amount at the time the proof is offered. This limitation, it must be noticed, would spring, not from the language of Subdivision 4 itself, but from the very nature of the claim.

This view finds abundant support in the Bankruptcy Reports. One of the leading cases dealing with this class of claims is

Moch v. Market St. Nat. Bank, 6 A. B. R. 11
(Ct. Ct. App., 3rd Ct.),

holding that where the liability of an endorser of commercial paper does not become fixed and absolute until after his bankruptcy, it may still be proved against his estate if such liability has become fixed

within the time limited for proving claims. It is interesting to observe that the Court in the course of its opinion uses the following language:

“The first and fourth subdivisions of Section 63 are *distinct* provisions, and are, we think, *independent* of each other. We are unable to agree with the proposition that subdivision 1 qualifies, and is to be carried down and read into subdivision 4. *On the face of the act they are distinct.*” (Italics ours.)

In *Cobb v. Overman*, 6 A. B. R. 324 (Ct. Ct. of App., 4th Circuit), the Court held that a bond given to secure the payment of an annuity in force at the date of the filing of the petition against the obligor, is a provable debt against his estate. The ruling in favor of provability in this case was made although it was necessary to calculate the expectancy of the annuitant in order to fix the liability. Furthermore, the Court did not look to Subdivision 4 to find its reason for the decision, but based its holding on the narrow language of Subdivision 1.

(See, in this connection, *Hibbard v. Bailey*, 12 A. B. R. 104.)

Along the same lines is the language found in *In re Swift*, 7 A. B. R. 374-381 (Ct. Ct. of App., 1st Ct.):

“Under some bankruptcy statutes provision was made for liquidating the present values of contingent debts and contingent liabilities for provable purposes, but the present statute does not expressly provide any machinery for that purpose. *It provides without apparent restriction for proof of debts founded on contracts express or implied.*” (Italics ours.)

The case of *In re Smith*, 17 A. B. R. 112, is a case thoroughly and carefully reasoned, and unless the language of the opinion there can be successfully challenged or controverted (which we doubt) we deem the case to be conclusive of the question involved here. The *Smith* case, like the *Moch* case, was one arising out of an endorsement of notes which did not mature until after the date of adjudication, although at the date of proof the notes had matured. It was said by the Judge:

“The claims in question are clearly within the terms of subdivision 4. This was the view of the learned judge in *Re Gerson* (D. C.), 5 Am. B. R. 89, 105 Fed. 891, affirmed by the Circuit Court of Appeals for the Third Circuit in *Moch v. Market Street National Bank*, 6 Am. B. R. 11, 107 Fed. 897. The latter case was cited in the opinion of the Supreme Court in *Dunbar v. Dunbar*, 190 U. S. 340, 350, 351, 10 Am. B. R. 139, 47 L. Ed. 1084. While *Moch v. Market Street National Bank* was neither approved nor disapproved, the opinion of the Supreme Court points out the precise point decided—i. e., that under section 63a, subd. 4, the creditor might prove against the estate of the bankrupt after the liability had become fixed. Moreover, it may be fair to say that the course of reasoning, wherein distinctions are made between classes of contingent claims, would hardly have been necessary had the Supreme Court been of the opinion that, upon a proper construction of section 63, all claims which had been contingent at the time of filing the petition were excluded from allowance, though no longer contingent at the date of proof. See, also, *In re Rothenberg* (D. C.), 15 Am. B. R. 485, 140 Fed. 798; *Collier on Bankruptcy* (5th Ed.), pp. 484, 489.

“But, aside from authority, and upon an independent reading of section 63, I am of the opinion that neither grammatical nor logical reasons require that subdivision 4 shall be limited by subdivision 1. It is very clear that subdivisions 1, 2, 3, 4 and 5 are not to be regarded as an enumeration of a group of characteristics, all of which are essential to a provable claim. On the contrary, the subdivisions specify separate classes of provable claims. It is a classification.” (Italics ours.)

“It is argued that, because subdivision 1 specifies a fixed liability absolutely owing, it excludes all liabilities which were contingent at the time of filing the petition from proof under other subdivisions. The logical fault is obvious. While contingent liabilities are excluded from class 1(defined by subdivision 1), it does not at all follow that liabilities now or formerly contingent are excluded from other distinct classes. The specification of certain characteristics for class 1, is no indication that cases comprehended in other classes may not have entirely different characteristics. Assuming that, so long as it is uncertain whether a contract or engagement will ever give rise to an actual liability, and that so long as the demand is contingent, it is not provable, it by no means follows that a demand which has ceased to be contingent before proof should be rejected because it had been contingent before the date of filing the petition. While the language, ‘Debts of the bankrupt * * * which are * * * founded upon an open account, or upon a contract express or implied’, may not include contingent obligations, it does include obligations no longer contingent, though they were contingent at the date of filing the petition.

“It has been argued that the only reasonable construction which can be given to subdivision 4 of section 63 is that it refers to claims upon

which a right of action has accrued at the time of the filing of the petition, and that to construe it as permitting proof of contingent claims is to make subdivision 1 superfluous and useless. It is to be observed, however, that the claims here in question, when proved, were no longer contingent; they had become present liabilities through the fact of non-payment and protest. There is no necessary inconsistency between a class which includes and provides for liabilities absolutely owing at the time of filing the petition, whether then payable or not, and a class of liabilities which includes debts which mature after the time of filing the petition. It does not follow, because contingent liabilities are excluded from the first group of classification, that liabilities founded upon express contracts, and which are no longer contingent at the date of proof of such liabilities, are not included within subdivision 4. It does not involve logical inconsistency to hold that subdivision 4 comprehends claims which are expressly excluded from subdivision 1, or even to hold that subdivision 4 includes claims contained within subdivision 1, as well as many others. A series of broadening classes is not unusual, and inclusion of a smaller class in a broader class is not inconsistency."

The excerpts from the Smith case have been thus freely borrowed because they constitute in themselves a convincing and, we believe, an unanswerable argument in support of the claim before the Court here. In our case, like in the endorser cases and surety cases, the liability became fixed within the time limited for the proof of claims. It certainly was as much a fixed liability at the date of the filing of the petition as that of an endorser on a promissory note or the surety on a bond. A surety might

never be called upon to pay; neither might an endorser. The liability of an endorser might be less than the face of the note; the liability of a surety might be less than the penalty expressed in the bond. Of course the liability of an endorser could not be more than the face of the note with interest, nor that of a surety more than the penalty expressed in the bond. So in our case the claimant might have paid to the lessors a sum less than that specified in the agreement with the bankrupt; he could not pay more and charge the bankrupt.

If the claims against endorsers and sureties are held to be provable where the liability becomes fixed after the filing of the petition, how can provability be denied to the claim here, where, as in the cases cited, the liability became fixed by the happening of the contingency, within the time limited for the proof of claims? It certainly is just as much a claim founded upon contract; and though the same element of doubt as to its ultimate amount existed at the date of the filing of the petition, it became fixed absolutely within the time limited for proof.

We feel perfectly safe, therefore, in resting upon the decisions to which attention has been called, and most of which, it will be noticed, are the views of Circuit Courts of Appeal. To the cases already cited may be added

In re Semmer Glass Co., 14 A. B. R. 25 (Ct. Ct. of App., 2nd Ct.);

In re James Dunlap Carpet Co., 20 A. B. R. 882.

As stated at the outset, there is a line of cases which holds that the limitations of 63a, Subdivision 1, should be carried down into the other subdivisions of the section. It will serve no purpose to review these cases, because, as said by the learned judge of the lower Court in an informal oral opinion (not made part of the record because not filed), "Upon
 " this question the authorities are in hopeless con-
 " flict, and nothing but a decision of the Court of
 " Appeals of this circuit will settle the law". So, also, said Judge McPherson, who in the case of

Re Caloris Mnfg. Co., 24 A. B. R. 611,

used the following language:

"The claimant filed its proof of debt on Feb. 23, 1910, for \$6,166.67, this being the difference between the amount of rent for the two terms. The referee disallowed the claim on the authority of Re Roth and Appel (D. C., N. Y.), 22 Am. B. R. 504, 174 Fed. 64, and the decision undoubtedly sustained his position. I cordially agree with Judge Hough that the conflicting decisions on this subject are in a state of 'hopeless confusion', and that an authoritative decision is much to be desired. Certainly, neither he nor I can give it, and it will probably need the intervention of the Supreme Court before the inferior tribunals will know what rule to obey. Meanwhile, however, I think the principle of Moch v. Market Street Bank (C. C. A., 3rd Cir.), 6 Am. B. R. 11, 107 Fed. 897, governs the district courts of this circuit, and requires us to hold that even although the landlord's claim in the present case was not a fixed liability under section 63a (1) when the petition was filed it was liquidated within the year and thus became provable as a claim founded upon a con-

tract express or implied under section 63a (4). The case of Moch was followed in *Re Dunlap Carpet Co.* (D. C., Pa.), 20 Am. B. R. 882, 163 Fed. 541, and I shall adhere to that ruling until its error is definitely established."

There is not a word in any of the cases relied upon by appellant which limits the decisions to cases of commercial paper. This is referred to now because some effort at such a contention was made by appellee below. Nor is there any difference in principle between the liability of an endorser and the liability of the bankrupt here to claimant. The effort of some Courts to draw such a distinction illustrates a certain looseness of reasoning in the case most relied on by appellee. (*Re Roth & Appel*, *supra*.) In the course of his opinion Judge Noyes says:

"It is not necessary for the purposes of the present case that we should go so far as to dispute the conclusions reached in these decisions. While a contract of indorsement is contingent, the extent of the liability is at all times ascertainable, and it might be that such a contract would be provable without it following that an indemnity contract covering possible loss of rents—both the existence and extent of liability upon which are uncertain and contingent—would be provable."

It requires no argument to controvert the statement that, "While a contract of indorsement is contingent, the extent of the liability is at all times ascertainable". An endorser may never be called upon to pay, or may be never legally compellable to

pay, or may be called on only in part. All this is true of the liability of the bankrupt here.

The same looseness appears throughout these decisions in their references to the language of the section, when, under the circumstances, it should be most carefully scrutinized. Cardinal rules of interpretation require that the utmost precision be used in giving effect to the entire phrasing of the statute. Yet we find important words omitted. Subdivision 1 does not require that the debt should be “a fixed liability absolutely owing at the time of the filing of the petition”, but “a fixed liability absolutely owing at the time of the filing of the petition *against him*” (the bankrupt). It is true that Section I, subdivision 1, provides that, “‘A person against whom a petition has been filed’ shall include a person who has filed a voluntary petition”. But by no stretch of judicial reasoning could this warrant the conclusion that the time of filing a voluntary petition is the same as the time of filing an involuntary one. Undeniably subdivisions 1 and 2 of Section 63a refer to involuntary cases only and have no application to the case at bar. Regarding this distinction, important as it is, the cases are all silent.

It necessarily follows that the only restriction on subdivision 4 of section 63a is that the claim be a *debt*. That the claim here in question is a debt will hardly be questioned. Appellee, himself, in a brief filed below, draws his definition of the term “debt”

from Loveland on Bankruptcy, 3rd Edition, page 339. We adopt it cheerfully. It follows:

“The word ‘debt’ seems to have been used in other bankruptcy acts, as defined by Mr. Justice Blackstone. He said: ‘The legal acceptance of debt is a sum of money due by certain and express agreement, as by a bond for a determinate sum; a bill or note; a special bargain; or *rent reserved on a lease*; where the quantity is fixed and specific and does not depend upon any subsequent valuation to settle it.’ That this is the sense in which ‘debt’ is used in this section is fairly to be inferred from the context.”

According to this definition, “rent reserved on a lease” is a debt. Consequently an agreement to pay half of it and later to compound it at not to exceed a given sum, would be equally so.

In view of the fact that in the Court below it was suggested by counsel for the Trustee that claimant here had no authority, after adjudication, to make a settlement with the lessors, it may be well before closing to say a few words upon this point. In the first place, even leaving out of consideration the irrevocable delegation of authority which the contract contained, the contract as such could not be terminated by a mere adjudication of bankruptcy. This much is held in unequivocal terms in the case of *Watson v. Merrill*, *supra*, dealing with the question of future rents. When, however, there is taken into consideration the fact that the Colman Company itself had an interest in the lease—in other words, in the subject matter concerning which it was to exercise a

power conferred by the bankrupt, it is clear that the authority was not, and could not be revoked by bankruptcy, or even death. It is a general rule that where a power of attorney is given for a valuable consideration, or is coupled with an interest, or is part of the security for the payment of money or performance of some other lawful act, it is irrevocable whether so expressed on its face or not.

Frink v. Roe, 70 Cal. 296;

Norton v. Whitehead, 84 Cal. 262.

For the reasons stated, therefore, we submit that the claim should have been allowed as filed, and that the order of the District Court sustaining the Trustee's exceptions to the order of the Referee, should be reversed.

Respectfully submitted,

JOSEPH C. MEYERSTEIN,

Attorney for Appellant.

No. 1946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLMAN COMPANY (a corporation),
Appellant,

vs.

T. W. WITHOFT, Trustee in Bankruptcy
of the Estate of FRANK H. SWEENEY,
Bankrupt,
Appellee.

In the Matter of

FRANK H. SWEENEY,
Bankrupt.

BRIEF FOR APPELLEE.

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Filed this.....*day of May, 1911.*

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

FILED

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BRIEF FOR APPELLEE.

Statement of Facts.

Before commencing our argument, we would suggest two amendments to the Statement of Facts contained in appellant's brief. The first is that the statement should show that claimant, appellant herein, not only had to close a contract for the rescission of the lease, but also had to *negotiate* its terms (Tr.

pp. 20-21) ; and secondly, the date of payment of the April rent, to-wit: April 1, 1909 (Tr. p. 21), should appear in counsel's summary. We think these amendments bring out more clearly the fact that on the 31st day of March, 1909, the date of the filing of the petition in bankruptcy, there was an absolute contingency of facts whether there would ever be any liability on the part of the bankrupt to respond either upon the agreement to pay one-half of the April installment of rent, or upon the subsequent agreement looking towards the rescission of the lease.

Argument.

There is but one question for this Court to determine—Are claims arising under Subdivision 4 of Section 63a of the Bankruptcy Act of 1898 limited in point of time as are claims arising under Subdivision 1 of said section? In other words, may a claim based upon contract, which is contingent at the time of the filing of the petition but which matures within the year, be proved in bankruptcy under Subdivision 4, though not provable under Subdivision 1?

The lower Court answered the question in the negative and expunged appellant's claim.

A CLAIM MUST BE A DEBT WHEN PRESENTED.

A perusal of Section 63a, Subdivisions 1 and 4, respectively, of the Bankruptcy Act of 1898, will

show that the word "debts" must be read into both subdivisions. A claim to be provable must be based upon a debt when presented. A debt is a present obligation to pay a fixed sum of money, and is not a mere contingency which may ripen into such an obligation at some time in the future. Such is the definition of a debt as laid down in the authorities.

The People etc. v. Arguello, 37 Cal. 524, at 525;

Re Adams, 12 Daly (N. Y.) 454-7;

Saleno v. City of Neosho, 48 Am. St. Rep. 653-9;

Loveland on Bankruptcy (3rd Ed.), page 342.

"A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable on a contingency, however, is not a debt, or does not become a debt until the contingency has happened."

The People v. Arguello, supra, page 525.

Loveland, supra, defines a debt in bankruptcy, at page 342 of his work, as follows:

"Where a liability of the bankrupt is not fixed so that it can be liquidated by legal proceedings instituted at the time of the bankruptcy, it is not a debt. It is deemed so far contingent that it cannot be proved in bankruptcy, nor is it released by the bankrupt's discharge. A sum of money payable upon a contingency is not provable because it does not become a debt until the contingency has happened."

A claim, then, to be provable must be based upon a debt in existence at the time the proof is offered. We do not think appellant will dispute this proposition. Such being the case, at what particular point of time must the present obligation or debt come into existence to permit proof and participation in bankruptcy proceedings? There is but one answer:

**THE STATUS OF A PROVABLE CLAIM IS FIXED AS OF THE
DATE OF THE FILING OF THE PETITION.**

Bankruptcy is intended to wipe out old items and to give a clean slate. The policy of the law is only accomplished when this result may be obtained with expedition. There is but one way to obtain such result: that is to have some fixed point of time at which all claims or demands against a bankrupt's estate must accrue in order that there may be no uncertainty as to the participants in the bankruptcy fund. Under the Bankruptcy Act of 1898 the date of cleavage is the date of the filing of the petition.

Remington on Bankruptcy, page 374;

Re Burka (D. C. Missouri), 5 A. B. R. 12;

Re Garlington, 8 A. B. R. 602 (D. C. Texas);

Re Adams, 12 A. B. R. 368 (D. C. Mass.);

Re Coburn (D. C. Mass.), 11 A. B. R. 212;

Swarts v. Fourth National Bank (Ct. Ct. of App., 8th Ct.), 8 A. B. R. 673;

Phoenix etc. Co. v. Waterbury, 20 A. B. R. 140;

Moulton v. Coburn (Ct. Ct. of App., 1st Ct.), 131 Fed. 201;

Re Bingham (D. C. Vermont), 94 Fed. 796;
Re Swift (Ct. Ct. of App., 1st Ct.), 112 Fed.
 315;

Slocum et al. v. Soliday (Ct. Ct. of App., 1st
 Ct.), 25 A. B. R. 460 (April Advance
 Sheets);

In the Matter of Cress-McCormick Co. (D. C.
 Miss.), 25 A. B. R. 464 (April Advance
 Sheets);

Re Roth & Appel (D. C.), 174 Fed., page 64,
 at 69;

Re Roth & Appel (Ct. Ct. of App., 2nd Ct.),
 181 Fed. 667; 22 A. B. R. 504.

Remington, at page 374 of his work on Bankruptcy, lays down the rule as follows:

“The question whether or not a debt is provable turns upon its status at the time of the filing of the petition.”

As illustrating that the date of filing the petition is the date of cleavage in bankruptcy, we will quote from the case of *Moulton v. Coburn et al.*, *supra*, 131 Fed. 201, wherein the Court, in passing upon the question whether or not the proper number of creditors had united in the petition in bankruptcy, had occasion to use the following language at page 204:

“We are of the opinion that the District Court was right in holding that upon a petition by less than three creditors it must appear that there were less than twelve creditors at the date of filing the petition, and therefore that the subsequent acts of the creditors and of the voluntary assignee need not be considered. To take

any other date for the count would result in uncertainty and confusion.”

In *Re Swift, supra*, 112 Fed. 321, the Court, in speaking of the Bankruptcy Act, uses this language:

“That part of the present bankruptcy act which described what debts may be proved does not repeat at all points the words ‘owing at the time of the filing of the petition’, but it is impossible to consider it other than as though it did thus repeat them. There can be no question that it is sufficient if the debt existed at the point of time of the filing of the petition in bankruptcy.”

In *Re Bingham, supra*, 94 Fed. 796, the Court lays down very positively the rule that obligations must be fixed and owing at the time of the filing of the petition; otherwise they are not provable. The following language is taken from page 796 of the decision.

“At the time of the filing of the petition the bankrupt owed James E. Hartshorn (set-off claimant) \$110.50; Hartshorn owed the bankrupt \$554.70, and both were holden on a note of \$1200.00 to a savings bank, one-half of which each ought to pay. The bank has proved its claim and Hartshorn has taken up the note. One-half of what he paid was his own debt, and he can have no claim against the bankrupt estate growing out of that. He insists that the balance of direct claims between him and the bankrupt should be set off against what he has paid that the bankrupt ought to have paid, and that the balance should stand as a valid claim in his favor against the estate. The bankrupt was impliedly bound to save him harmless from this part of that debt and has not done so; *but the detriment has occurred since the filing of the petition, and until that occurrence Hartshorn*

had no provable claim on that account. By this bankrupt act all claims turn upon their status at the time of the filing of the petition, and decisions upon statutes having different provisions in this respect will not afford safe guides for the construction of this." (Italics ours.)

A perusal of the above case will show that it is on all fours with the case to be decided by this Court, as in that case there was a contract to answer for a certain proportion of a certain obligation which did not mature and become fixed until after the filing of the petition in bankruptcy; the Court consequently held that no claim arose on such contract which could be set off or proved in the bankruptcy proceedings.

There is no question but that the date of the filing of the petition is the all-important date in bankruptcy. A perusal of the above cases will demonstrate this proposition. On that date the actors in the proceeding are identified and their respective rights are determined. Any other conclusion would lead to uncertainty in ascertaining the creditors entitled to participate in the bankruptcy proceeding; to delay in closing up bankrupt estates; and generally to injustice to both bankrupt and creditors.

CLAIMS CONTINGENT AT THE TIME OF THE FILING OF THE PETITION NOT PROVABLE.

Under the Bankruptcy Act of 1898, contingent claims are not provable.

Dunbar v. Dunbar, 190 U. S. 340;

Remington on Bankruptcy, page 381, Section 640;

Re Mahler (D. C. Michigan), 5 A. B. R. 453;
Re Arnstein (D. C. New York), 4 A. B. R.
 246;

Re Collignon (D. C. New York), 4 A. B. R.
 250;

Watson v. Merrill (Ct. Ct. of App., 8th Ct.),
 14 A. B. R. 453;

Re Imperial Brewing Co. (D. C. Missouri),
 16 A. B. R. 110;

Re Inman (D. C. Georgia), 22 A. B. R. 524;

Re Swift (Ct. Ct. of App., 1st Ct.), 112 Fed.
 315;

Slocum v. Soliday, *supra*;

Re Roth & Appel (D. C.), *supra*;

Re Roth & Appel (Ct. Ct. of App.), *supra*;

Cress-McCormick Co., *supra*;

Goding v. Rosenthal, 61 N. E. 222;

Re Rome (D. C. N. J.), 162 Fed. 971.

We quote from the case of *Goding v. Rosenthal*,
supra:

“By the execution of the bond of March 29, 1898, to August, in which the present plaintiff was a surety for the present defendant, the latter incurred an obligation to the present plaintiff to reimburse him any amount which he might be compelled, as surety, to pay upon the bond. This obligation was in force when, on February 13, 1900, the present defendant’s petition in bankruptcy was filed. It was an obligation founded upon an implied contract, and it was evidenced by an instrument in writing, and in one sense it was a fixed liability. But no debt was absolutely owing at the time of the petition. *The obligation was contingent upon*

the happening of a breach of the bond and a payment by the surety. The payment by the surety was not until June 12, 1900, and there seems to have been no breach of the bond before that date. Therefore, neither the pledgee in the bond nor the surety could prove in the bankruptcy proceedings a claim founded upon the bond, unless merely contingent claims are provable under the Bankruptcy Act of 1898.” (Italics ours.)

In the above case it was determined that there was no provable claim.

The rule as to contingent claims is very clearly laid down by the Supreme Court of the United States in the case of *Dunbar v. Dunbar, supra*, at page 350, as follows:

“We do not think that by the use of the language in Section 63a it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove.”

It is now important to determine what really constitutes a contingent claim, and by what criterion it may be judged. We find no clearer definition than is to be found in Remington in his work on Bankruptcy, Section 641, page 382, as follows:

TEST OF CONTINGENCY.

“The test as to whether a claim is really contingent or is simply unliquidated or unascertained by legal proceedings would seem to be this: Have all the facts necessary to be proved to fasten liability already occurred? If so, the claim is not contingent, although the liability and the extent of damages may not yet have

been ascertained by the consideration of a court, as evidenced by judgment or decree, nor even the full extent of damages arising been all suffered. The contingency, in other words, is a contingency of facts necessary to fasten liability at all, not a contingency of the court's judgment on the facts, nor a contingency as to the extent of the damages resulting from the injury. Again, so long as it remains uncertain whether the contract or liability will ever give rise to an actual duty or liability and there is no means of removing the uncertainty by calculation, it is too contingent to be a provable debt."

Applying the above test to the Colman claim, it will immediately appear that the claim was contingent at the time of the filing of the petition in bankruptcy. The April rent had not as yet become payable, nor had the same been paid by appellant. The contract for the rescission of the lease was as yet unexecuted. If the Court had been called upon to calculate the amount of appellant's claim on March 31, 1909, the date of the filing of the petition, it would have been absolutely impossible for it to have done so. At that time there was a mere contingency; there was no binding or fixed obligation upon the bankrupt to pay anything to the Colman Company; there could be no such obligation until, in the first place, claimant had paid the April rent in full, or at least had paid more than its proportionate part thereof; and, in the second, it had obtained a rescission of the lease upon the terms stipulated. Many things might have happened before either of these contingencies had occurred, and at the time of the filing of the petition it was impossible for anyone to

say that the bankrupt would ever become liable on either one of his covenants. At that time there was an absolute “contingency of facts necessary to fasten liability” upon Sweeney, the bankrupt.

**CLAIMS ARISING UNDER SUBDIVISION 4 OF SECTION 63a OF
THE BANKRUPTCY ACT OF 1898 MUST BE “OWING” AT THE
TIME OF THE FILING OF THE PETITION IN BANKRUPTCY.**

The weight of authority is that claims arising under Subdivision 4 of Section 63a of the Bankruptcy Act of 1898 must be “fixed”—as are claims under Subdivision 1—at the time of the filing of the petition, to be provable in bankruptcy.

Remington on Bankruptcy, page 406, Section 669;

Remington on Bankruptcy, page 407, Section 672;

Remington on Bankruptcy, page 410, end Section 672;

Collier on Bankruptcy (7th Ed., 1909), page 711;

McCabe v. Patton (Ct. Ct. of App., 3rd Ct.),
23 A. B. R., page 335;

Re Swift, supra;

Re Bingham, supra;

Re Adams, supra;

Re Burka, supra;

Re Roth & Appel (D. C.), *supra*;

Re Roth & Appel (Ct. Ct. of App.), *supra*;

Re Inman, supra;

Slocum v. Soliday, supra;

In the Matter of Cress-McCormick Co., supra.

The rule is very clearly stated, and at the same time the contrary rule as exemplified in the *Gerson* (*Moch v. Market Street Bank*) and *Smith* cases, relied upon by appellant, is commented upon adversely, by Remington at page 410 of his work on Bankruptcy in the following language:

“Whether one import the clause ‘absolutely owing at the time of the filing of the petition’ into the subsequent classes or not, nevertheless from the nature of things it is a necessary qualification of all the subsequent classes. The date of the filing of the petition is the date of cleavage; contractual relations not then merged into provable debts are not dissolved, and in the absence of statutory provisions permitting the proof of claims by those secondarily liable for their payment, doubtless claims upon endorsements before maturity and default would be held to be contingent and not provable. But the statute, by thus permitting one who is secondarily liable for the bankrupt’s debt to prove the debt in the name of the creditor (which may be done even before the maturity of the debt by a proper rebate of interest), makes the debt of the one secondarily liable quasi provable, and therefore dischargeable, thus protecting the rights of the surety and of the bankrupt as well. *But all this is done by way of exception, necessarily implied, to the rule that contingent claims are not provable. Based upon their provability being by way of exception, the criticisms and distinctions pointed out in In re Gerson, supra, and In re Smith, supra, become immaterial.*”

Again, the rule is stated in the case of *In re Adams, supra*, at page 369, as follows:

“But a creditor cannot prove for an indebtedness arising between the filing of the involuntary petition and adjudication. This appears from the analogy of Section 63a, 1, 2, 3 and 5, as applied to the interpretation of clause 4, Act July 1, 1898. * * * In clauses 1 and 4, for example, the limit of time must be the same, inasmuch as clause 4 includes clause 1, and if clause 4 were less limited in point of time, the limit imposed on clause 1 would become nugatory.”

We would also call the Court's attention to the comment upon the *Gerson* case, the foundation of the doctrine relied upon by appellant, made by Remington in a note on page 1615 of his treatise. The criticism shows how illogical is the *Gerson* case, and sets forth very sound reasons for the doctrine of that case not being extended any further than its terms permit; that is, that the rule there laid down should be restricted to commercial paper and not extended to contracts and claims of the character here involved.

Collier in his work on Bankruptcy (7th Ed.), *supra*, at page 711, states the rule in this language:

“Subdivision 4 does not repeat the words ‘absolutely owing at the time of the filing of the petition against him’, but it is probable that they should be read therein, for it is evident that the status of the debt founded on a contract is to be determined as of the time when the petition was filed.”

That the doctrine of the *Gerson* case should not be extended to cases other than commercial paper,

and that the case of *In re James Dunlap Carpet Company*, cited by appellant, is unsound in point of law, will appear by a reference to the language used in the case of *In re Inman*, 22 A. B. R. 524, at page 536, as follows:

“I can see no similarity at all between such a case (meaning the *Gerson* case) and the case of an employee seeking to prove for salary to be earned by services to be rendered in the future. The endorsement in the *Moch* case was a fixed liability which the endorser had undertaken for the bankrupt and which was in existence before the bankruptcy proceedings commenced. * * * This is entirely different from a contract to render personal services. Such services depend upon the life, health and ability otherwise of the employee to render the services, and also upon the life certainty, and perhaps other contingencies as to the employer.”

In the last case where the question here involved was squarely raised, to-wit: *In re Roth & Appel*, *supra*, decided by the Circuit Court of Appeals of the Second Circuit, the Court decided in favor of the contention here made by appellee and uses the following language at pages 673-4 of the Opinion appearing in 181 Federal, in respect to the contention that, although a claim might not be provable under subdivision 1 of Section 63a, it might be provable under Subdivision 4 of said section:

“But while it is not necessary, in order to reach a decision in this case, to determine whether 63a (4) is subject to the limitation contained in Section 63a (1), that debts to be provable must be absolutely owing at the time of the filing of the petition, *we think it the better view*

that it is so limited. If it is not so limited, the limitations in the first subdivision are practically of no effect. All claims upon instruments in writing not provable under the first clause, because not absolutely owing at the time of the petition, might be proved as claims founded upon a 'contract express or implied', under the fourth clause, if no limitations are attached to the latter. We cannot regard this interpretation as tenable. *We think that the above clauses of 63a should not be considered as independent, but should be read together, and that the said limitation in the first clause should be considered as repeated in the fourth clause.*" (Italics ours.)

The Court in the above case expressly approved the cases *In re Swift*, *supra*, and *In re Adams*.

Counsel quotes an excerpt from the Opinion of the lower Court, which would seem to indicate that the judge who decided this case had no definite opinions upon the subject. This impression is erroneous, however, as a perusal of the following language will show:

"It is unnecessary for the Court at this time to comment on these authorities, or even refer to them, but it is enough to say that I have examined them all and examined the text books, and am impressed with the soundness of reasoning of Judge Hough and the Court of Appeals of the Second Circuit in the case of *Roth & Appel*, 174 Fed. 64, and the same case approved and reported in the 24th A. B. R. 534, supported as it is by the Circuit Court of Appeals of the First Circuit in *Re Swift*, 112 Fed. 366, and by the opinions of the text writers upon the bankruptcy law. The holding of the authorities is that the different clauses of Section 63a should not be construed as independent, but should be

construed together, and therefore no debt is provable unless the facts fixing the liability exist at the time of the filing of the petition in bankruptcy; except, possibly, in cases of a bankrupt endorser of negotiable paper where the liability matures after the filing of the petition."

This brings us to a consideration of the argument and authorities cited by appellant.

REFUTATION OF APPELLANT'S ARGUMENT.

Counsel states on page 6 of his brief that the cases cited by appellee "all ignore the fact that Subdivision 4 of Section 63a is co-ordinate with Subdivision 1 of the same section, and hence not controlled or limited by it". This is not our opinion of the cases cited in our behalf. In all of them, where the proposition was squarely put before the Court, the conclusion reached was that Subdivisions 1 and 4 of Section 63a were not co-ordinate, but should be read together. Counsel attempts to pick flaws with this reasoning by stating that if Subdivision 4 is to be limited by Subdivision 1, then Subdivisions 2, 3 and 5 should be likewise so limited. The criticism is not just. Subdivisions 1 and 4 are upon kindred subjects, to-wit: contracts; Subdivisions 2, 3 and 5 have no relation to contracts. There is no analogy between Subdivisions 2, 3 and 5 and Subdivisions 1 and 4. The reason why Subdivisions 1 and 4 should be construed together, and why no such necessity requires a like construction in dealing

with Subdivisions 2, 3 and 5, is the elementary principle of statutory construction that statutes or parts of statutes *in pari materia*, that is, dealing with the same subject matter, should be so construed that one statute or portion of a statute should not be given such a meaning as to nullify other statutes or portions thereof upon the same subject matter. In other words, where a Court may adopt either one of two constructions, one of which tends to nullify a portion of a statute, while another tends to give force to all its parts, that construction should be adopted which will tend to give meaning and force to the statute as a whole.

Lewis' Sutherland Statutory Construction
(2nd Ed.), Vol. 2, page 659, Sec. 344, and
cases cited;

Atkins v. Disintegrating Co., 85 U. S. (18
Wall.) 272, at 301 et seq.

If counsel's construction is adopted, Subdivision 4, by being more unlimited as to time, nullifies Subdivision 1 of Section 63a of the Bankruptcy Act, as Subdivision 4 includes Subdivision 1, both dealing as they do with contracts.

A glance at the cases cited by appellant will show that each and every one of them is based upon *Moch v. Market Street Bank*. That case in terms—if the same be examined carefully—is restricted to commercial paper, and was not intended to apply to contracts or obligations of the character here involved. In fact, the Court expressly states that the decision

was not intended to cover obligations such as surety bonds where the liability and amount of liability depended upon future defaults.

In the case of *Cobb v. Overman*, 6 A. B. R. 324, cited by appellant, there was no question of the construction of Subdivision 4 involved, as the Court there determined that the liability at the time of the filing of the petition became fixed. And likewise in the case of *Hibbard v. Bailey*, cited by appellant, the Court holding in that case that at the time of the filing of the petition there was no longer any contingency as to the liability of the bankrupt, but that the same had become fixed long prior thereto by an order of the Orphan's Court.

The case of *In re Swift*, found *supra* in our authorities and cited by appellant, is against appellant rather than in his favor, as a consideration of the language at page 315 of the decision, as reported in 112 Federal, will show.

The case of *In re Semmer Glass Co.*, 14 A. B. R. 25, cited by appellant, deals with commercial paper and is, as we believe, not a case in point in determining this appeal.

The case of *In re Dunlap Carpet Co.*, cited by appellant, is a District Court decision, and is based upon the *Moch* case. The reasoning, in our opinion, is ill-considered and illogical, and, as we have before shown, was adversely commented upon in the case of *In re Inman*, *supra*.

In the case of *In re Caloris Manufacturing Co.*, 24 A. B. R. 611, cited by counsel, the decision therein is

not by a Circuit Court of Appeals, but is by the District Court of Pennsylvania, and was decided before the Circuit Court of Appeals' decision in the case of *In re Roth & Appel, supra*. The opinion is very unsatisfactory. The conclusion is really reached because the Court felt itself bound by the decision in the *Moch* case, which was rendered by the Circuit Court of Appeals in the Third Circuit, and consequently binding upon the District Court of Pennsylvania. An examination of the opinion will show that the judge was by no means satisfied with the decision, but that he reached the conclusion he did only because he felt bound by the decision in the *Moch* case.

The *Smith* case, which is counsel's chief authority, arose in and was decided by the District Court of Rhode Island, and the decision is based upon the *Moch* case, as a consideration of the opinion will disclose. The case deals with commercial paper. The decision is not an authority in favor of appellant; it in our opinion is restricted to commercial paper. If not so restricted, the decision is illogical and unsound, both in reason and in law. We would call attention to the comment upon this case appearing in the case of *In re Roth & Appel, supra*, 181 Fed., at page 673—a comment made by the Circuit Court of Appeals of the Second Circuit in 1910.

We will now examine the case of *In re Smith*, 17 A. B. R. 112, and we believe that without difficulty an analysis of that decision will demonstrate that it is not the authority that counsel would have it appear. The vice in the decision is threefold.

In the first place, the learned Judge overlooks the very important fact that in bankruptcy practically everything dates from the filing of the petition, such date being the date of cleavage. By overlooking this fact, uncertainty and delay follows. There should be some particular point of time at which all claims against a bankrupt's estate should accrue, so as to be provable, and from liability for which the bankrupt can obtain a discharge. With such a rule the participants in the trust fund at the same moment all come into being and are definitely identified. Under the construction adopted in the *Smith* case, the participants in the fund before the expiration of the year are left uncertain and never become identified until their claims mature. Great hardship is thereby worked. As all claims maturing within the year are provable, the creditors holding such unmatured claims, though participants in the bankruptcy proceedings, would have no standing in the Bankruptcy Court before their claims become provable; until such event they would be compelled to stand passively and helplessly by, without voice to protect their rights, and watch the estate assets exhausted in the payment of matured claims, there being no requirement in the bankruptcy law that the trust fund should be held until the year had expired. Yet these participants, having no standing in the bankruptcy proceeding until their claims mature, would be barred from all redress both as against the estate of the bankrupt and against him personally, for the reason that in the first place, the fund having been

exhausted, there would be no assets with which to pay their claims when matured, while in the second place, having provable claims, they would lose all redress against the bankrupt, for the reason that the discharge in bankruptcy relieves him from all liability on provable debts.

The *Smith* case is in error when it states that if the claim matured within the year after the filing of the petition, it is a claim which may be proven in bankruptcy under Section 57n of the Bankruptcy Act. This section in no way broadens the classes of provable debts, but limits the time within which provable debts must be presented and filed.

In re Roth & Appel, 174 Fed. 64, at 69.

In the second place, the Court, in rendering the *Smith* decision, errs in that it loses sight of the fact that the present Bankruptcy Act is silent upon a point which was always expressly provided for in previous acts of bankruptcy. The bankruptcy acts prior to that of 1898 made definite provision for contingent claims, and set forth a mode of procedure whereby they might be liquidated and proven in the bankruptcy proceeding. In the present act no such provision is made. The silence of the act of 1898 in this respect is significant. Courts by construction should not attempt to graft a provision upon an enactment which is not expressly provided for and which by implication was not intended to be covered.

The Supreme Court of the United States, in the cases of *Bards v. First National Bank, etc.*, 4 A. B.

R. 163-175, and *Carson et al. v. Chicago etc.*, 5 A. B. R. 814-822, has laid down a rule to be applied in the construction of the present Bankruptcy Act. These cases involve different questions from that presented here, but the questions presented required the Court to adopt a rule of construction in both cases. In laying down the rule, the Court, in the *Bards* case, said:

“The bankrupt acts of 1867 and 1841, as has been seen, each contain a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law and in equity between the assignees in bankruptcy and an adverse claimant of the property of the bankrupt. *We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision and substituted the restricted provisions of Section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provisions of the earlier acts.*” (Italics ours.)

In the *Carson* case, *supra*, the Court after referring to the fact that the Bankruptcy Act of 1867 contained certain provisions, went on to say:

“The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions and committed to doubt and controversy? There is a presumption against it. *When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose.*” (Italics ours.)

Applying the above rule of construction, there can be no question but that contingent claims not provided for in the Bankruptcy Act of 1898 are, by such omission, excluded from participation in the bankruptcy proceeding. This Court should not give such a construction to Section 63a (4) as to permit claims contingent at the time of the filing of the petition but maturing within the year after such filing, to be proven. Such a decision would in terms expressly permit the proof of contingent liabilities.

Thirdly, the *Smith* case is erroneous in that by its rule of broadening classes the Court has practically rendered nugatory subdivision 1 of Section 63a. Subdivision 4 must necessarily include subdivision 1, for the reason that obligations evidenced by a writing mentioned in subdivision 1 can mean nothing other than contracts, and, as in that subdivision it is provided that such obligations must be fixed and owing at the time of the filing of the petition, the prohibition would be rendered of no force and without effect by construing subdivision 4 as to be not so limited, and would permit the proof of claims under subdivision 4 which were expressly forbidden by subdivision 1. This Court needs no argument on the point that a statute must be so construed that force will be given to all its terms, and that where one construction would tend to nullify a provision of a statute while another would tend to give it effect, that construction should be adopted which will give effect to the statute as a whole and to all its provisions.

The foregoing reasons sufficiently show the vice of the *Smith* decision. The case can be supported neither in logic nor in law. It is at variance with the trend of authority and with the Bankruptcy Act itself.

We hardly believe that counsel makes the point on page 15 of his brief seriously. Counsel admits that by the terms of the Bankruptcy Act itself the expression, "a person against whom a petition has been filed", must be construed to "include a person who has filed a voluntary petition". Yet he states that "by no stretch of judicial reasoning could this war-rant the conclusion that the time of filing a voluntary petition is the same as the time of filing an involuntary one". We do not follow him. The time of filing either petition is determined by the date when the petition is actually filed with the Court. No judicial reasoning is necessary to determine this fact. As by the terms of the Bankruptcy Act the expression "a person against whom a petition has been filed" shall include "a person who has filed a voluntary petition", Section 63a (1) of the Bankruptcy Act must be construed by this Court to read as follows: "a fixed liability absolutely owing at the time of the filing of the petition (*by* or) against him". The Bankruptcy Act provides that the one shall include the other, and consequently this Court must give the above construction to the phrase quoted above. Had Congress intended to limit subdivision 1 to involuntary cases, it would have by apt language, as in subdivision 2 of Section 63a, set

forth that intention. In subdivision 2 Congress *ex industria* shows that involuntary cases are intended, by using the expression: “due as costs taxable “*against an involuntary bankrupt*, who was at the “time”, etc. (Italics ours.) No such expression is found in subdivision 1. We do not see how the Court can possibly adopt the construction contended for by counsel, and, if the truth were told, we do not think that counsel seriously believes that this Court will adopt such a construction.

We therefore submit that for the reasons stated above the claim of the Colman Company should be disallowed and expunged from the record, and that the order of the District Court sustaining the trustee’s exceptions to the order of the referee should be affirmed.

Respectfully submitted,

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